Mohamad Ezam bin Mohd Nor & Ors v Tan Sri Norian Mai & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S-21–39 OF 2004
LAU BEE LAN J
30 OCTOBER 2012

Damages — Measure of damages — Tort — False/unlawful arrest and detention — Press statement by Inspector General of Royal Malaysian Police — Claim for general, aggravated and exemplary damages — Internal Security Act 1960 s 73(1)

Tort — Damages — Defamation — False/unlawful arrest and detention — Press statement by Inspector General of Royal Malaysian Police — Reports by local newspapers — Whether press statement defamatory — Internal Security Act 1960 s 73(1)

In the present action, the plaintiffs claimed for general, aggravated and exemplary damages against the defendants for the tort of false/unlawful arrest and detention; and the tort of defamation. Briefly the facts were that the second, third and fourth plaintiffs were arrested and detained by the police under s 73(1) of the Internal Security Act 1960 ('ISA'). The next day, the first defendant, the Inspector-General of the Royal Malaysian Police, held a press conference releasing press statement in respect of the plaintiffs' arrest. The second, third and fourth plaintiffs contended that the first defendant's allegation of them being involved in militant activities were untrue; the publication was defamatory of them and was published maliciously and that the first defendant had no justifiable reason to support their defence of qualified privilege. Several major local newspapers carried the news on, reporting the first defendant to have said that several other related arrests were forthcoming. The fifth and sixth plaintiffs were next arrested and detained under s 73(1) of the ISA. Their arrests reported in the newspaper reports of *The Malay Mail* referred specifically to the earlier statement of the first defendant in the press release. In the present action, the plaintiffs testified that they were not informed of their 'grounds' of arrest and that the evidence before the court was all hearsay as the only people who have first-hand knowledge and who could give evidence of the purported unlawful/militant activities of the plaintiff were the intelligence officers of the Special Branch, none of whom were called as witnesses.

Held, allowing the claim:

(1) The principle of res judicata was not applicable for the issue of an arrest

under s 73(1) of the ISA. Res judicata applied where the parties could not raise a second time in the same suit an issue that had already been determined either expressly or by necessary implication (see para 12).

(2) The arresting officers must inform the plaintiffs the 'grounds' of arrest at the point of arrest and there must be sufficient material particulars to show the basis of the reasons to believe that the detention of the plaintiffs was necessary to prevent them from acting in a manner prejudicial to the security of the country; and not the mere regurgitation by the arresting officers that they had reason to believe that the detention of the plaintiffs was necessary to prevent them from acting in a manner prejudicial to the security of the country (see para 24).

(3) Redacted documents were inadmissible. The handwritten notes were primary evidence of the redacted documents and these notes could not be produced. However under s 63 of the Evidence Act 1950 ('Act'), secondary evidence could be produced and admissible as evidence in certain circumstances under s 65. The redacted documents produced in court were photocopies of the typewritten version. The typewritten version was secondary evidence under s 63(1)(c) of the Act being 'copies made from or compared with the original'. Hence the redacted documents were copies of a copy. And were not receivable in evidence unless one can compare with the originals. Having ruled that the redacted documents were inadmissible, the court was of the view that the defendants have no credible evidence to rebut the plaintiffs' evidence that the defendants were acting mala fide (see paras 38–44).

(4) The press statement and the 'berita' as contained in the newspaper reports were defamatory of the second, third, fourth and sixth plaintiffs but not of the fifth plaintiff. The test is an objective one where the ordinary reader must have rational grounds for his belief that the words refer to the plaintiff and giving no room for undue suspicion or pure speculation. Therefore the contention of the plaintiffs that the impugned words refer to the fifth plaintiff and were defamatory of him, could not be accepted (see para 86).

(5) The plaintiffs' defence of justification did not lie with the first defendant for the reason that there was no evidence or material particulars produced to substantiate the contention of the police that the plaintiffs were involved in any violent or aggressive militant activities capable of overthrowing the government prior to their arrests. There was evidence where the searches conducted on the plaintiffs' respective premises showed no items capable of suggesting that the plaintiffs were involved in such militant activities (see para 90).

[Bahasa Malaysia summary

Dalam tindakan ini, plaintif-plaintif menuntut ganti rugi am, tambahan dan teladan terhadap defendan-defendan untuk tort kerana tangkapan dan

tahanan palsu/menyalahi undang-undang; dan tort fitnah. Secara ringkas faktanya adalah bahawa plaintif-plaintif kedua, ketiga dan keempat telah ditangkap dan ditahan oleh polis di bawah s 73(1) Akta Keselamatan Dalam Negeri 1960 ('AKDN'). Keesokan hari, defendan pertama, Ketua Inspektor Polis DiRaja Malaysia telah mengadakan sidang akhbar mendedahkan kenyataan akhbar berkaitan tangkapan plaintif-plaintif. Plaintif-plaintif kedua, ketiga dan keempat berhujah bahawa dakwaan defendan pertama tentang mereka terlibat dalam kegiatan militan adalah tidak benar; penerbitan itu berunsur fitnah tentang mereka dan diterbitkan dengan niat jahat bahawa defendan pertama tiada alasan wajar untuk menyokong pembelaan mereka berhubung perlindungan bersyarat. Beberapa akhbar utama tempatan telah menyiarkan berita itu, melaporkan defendan pertama telah mengatakan akan ada tangkapan susulan yang berkaitan. Plaintif-plaintif kelima dan keenam telah ditangkap seterusnya dan ditahan di bawah s 73(1) AKDN. Tangkapan mereka telah dilaporkan dalam laporan akhbar *The Malay Mail* yang merujuk khususnya kepada kenyataan terdahulu defendan pertama dalam sidang akhbar itu. Dalam tindakan ini, plaintif-plaintif telah memberi keterangan bahawa mereka tidak diberitahu 'alasan' mereka ditangkap dan bahawa keterangan di hadapan mahkamah kesemuanya adalah dengar cakap kerana hanya orang yang mempunyai pengetahuan langsung dan yang boleh memberi keterangan tentang kegiatan bertujuan menyalahi undang-undang/militan plaintif merupakan pegawai-pegawai Perisikan Cawangan Khas, yang mana tiada seorangpun yang dipanggil sebagai saksi.

Diputuskan, membenarkan tuntutan:

(1) Prinsip res judicata tidak terpakai untuk isu tangkapan di bawah s 73(1) AKDN. Res judicata terpakai di mana pihak-pihak tidak boleh membangkit untuk kali kedua dalam guaman yang sama isu yang telahpun ditentukan sama ada secara nyata atau melalui implikasi yang perlu (lihat perenggan 12).

(2) Pegawai-pegawai tangkapan perlu memberitahu plaintif-plaintif 'alasan' tangkapan pada masa tangkapan itu dan perlu ada butiran penting yang mencukupi untuk menunjukkan asas alasan-alasan untuk mempercayai bahawa penahanan plaintif-plaintif adalah perlu untuk mengelakkan mereka daripada bertindak secara prejudis kepada keselamatan negara dan bukan hanya regurgitasi oleh pegawai-pegawai tangkapan yang mereka mempunyai alasan untuk mempercayai bahawa penahanan plaintif-palitnif adalah perlu untuk mengelakkan mereka daripada bertindak secara prejudis kepada keselamatan negara (lihat perenggan 24).

(3) Dokumen-dokumen yang disunting tidak boleh diterimapakai. Nota-nota bertulis tangan adalah keterangan primer dokumen-dokumen yang disunting dan nota-nota tersebut tidak boleh dikemukakan. Walau

bagaimanapun di bawah s 63 Akta Keterangan 1950 ('Akta tersebut'), keterangan sekunder boleh dikemukakan dan diterima pakai sebagai keterangan dalam keadaan tertentu di bawah s 65. Dokumen-dokumen yang disunting yang dikemukakan di mahkamah adalah fotokopi versi yang bertaip. Versi yang bertaip adalah keterangan sekunder di bawah s 63(1)(c) Akta tersebut yang merupakan 'copies made from or compared with the original'. Justeru dokumen-dokumen yang disunting adalah salinan-salinan suatu salinan. Dan ia tidak boleh diterima dalam keterangan kecuali seorang itu boleh membandingkannya dengan yang asal. Setelah memutuskan bahawa dokumen-dokumen yang disunting tidak boleh diterima pakai, mahkamah berpendapat bahawa defendan-defendan tiada keterangan yang boleh dipercayai untuk mematahkan keterangan plaintif-plaintif bahawa defendan-defendan telah bertindak dengan niat jahat (lihat perenggan 38–44).

(4) Kenyataan akhbar dan 'berita' sebagaimana terkandung dalam laporan akhbar adalah berunsur fitnah terhadap plaintif-plaintif kedua, ketiga, keempat dan keenam tetapi tidak terhadap plaintif kelima. Ia adalah ujian objektif yang mana pembaca biasa perlu mempunyai alasan-alasan rasional untuk kepercayaannya bahawa perkataan-perkataan tersebut merujuk kepada plaintif dan tidak memberikan ruang untuk syak wasangka yang tidak berpatutan atau spekulasi tulen. Oleh itu hujah plaintif-plaintif bahawa perkataan-perkataan yang dipersoalkan merujuk kepada plaintif kelima dan adalah berunsur fitnah terhadapnya, tidak boleh diterima (lihat perenggan 86).

(5) Pembelaan justifikasi plaintif-plaitnif tidak terletak pada defendan pertama oleh sebab tiada keterangan atau butiran penting dikemukakan untuk mengesahkan hujah polis bahawa plaintif-plaintif terlibat dalam apa-apa kegiatan militan yang ganas atau agresif yang mampu menggulingkan kerajaan sebelum tangkapan mereka. Terdapat keterangan di mana carian yang dilakukan ke atas premis-premis plaintif-plaintif masing-masing menunjukkan tiada item yang mampu mencadangkan bahawa plaintif-plaintif terlibat dalam kegiatan militan sedemikian (lihat perenggan 90).]

Notes

For cases on defamation, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 209–231.

For cases on tort, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 335–337.

Cases referred to

Abdul Ghani Haroon v Ketua Polis Negara and another application (No 3) [2001] 2 MLJ 689; [2001] 2 CLJ 709, HC (refd)

Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal [2006] 1 MLJ 320; [2005] 4 CLJ 445, FC (refd)

Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & another application [2005] 3 MLJ 1; [2004] 4 CLJ 350, FC (refd)
Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136; [2007] 4 CLJ 526, CA (refd)
Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (refd)
Badrul Zaman PS Md Zakariah v Superintendent, Preventive Detention Centre, Kamunting & Ors [2011] 4 CLJ 873, HC (refd)
Borhan bin Hj Daud & Ors v Abd Malek bin Hussin [2010] 6 MLJ 329; [2010] 8 CLJ 656, CA (folld)
Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)
Christie & Anor v Leachinsky [1947] 1 All ER 567, HL (refd)
Chung Khiaw Bank (Malaysia) Bhd v Tio Chee Hing [2004] 3 CLJ 59, CA (refd)
Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd [1997] 2 MLJ 829; [1997] 3 CLJ 365, FC (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)
Dato Annas bin Khatib Jaafar v Datuk Manja Ismail & Ors [2011] 8 MLJ 747, HC (refd)
Dr Sanusi bin Osman dan lain-lain lwn Datuk Ismail Che' Ros dan lain-lain [2011] 3 MLJ 274; [2010] 3 CLJ 198, HC (refd)
Gurcharan Singh a/l Bachittar Singh @ Guru v Penguasa Tempat Tahanan Perlindungan Kemunting, Taiping & Ors [2000] 2 MLJ 1; [2000] 1 CLJ 625, CA (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57; [1997] 2 CLJ 104, CA (refd)
Hindustan Construction Company Ltd v Union of India AIR 1967 SC 526, SC (refd)
Institute of Commercial Management United Kingdom v The New Straits Times Press (Malaysia) Bhd [1993] 1 MLJ 408; [1993] 2 CLJ 365, HC (refd)
Jones v Skelton [1963] 3 All ER 952, PC (refd)
Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals [2003] 1 MLJ 321, FC (not folld)
Karam Singh v Menteri Hal Ehwal Dalam Negeri [Minister of Home Affairs], Malaysia [1969] 2 MLJ 129; [1969] 1 LNS 65, FC (refd)
Karpal Singh a/l Ram Singh v DP Vijandran [2001] 4 MLJ 161; [2001] 3 CLJ 871, CA (refd)
Kerajaan Malaysia & Anor v Yong Moi Sin [2010] 3 MLJ 862, HC (refd)
Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)
Kuan Kwai Choi v Ak Zaidi bin Pg Metali [1993] 2 MLJ 207, HC (refd)
Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal [2006] 1 MLJ 675; [2005] 4 CLJ 871, CA (refd)
Le Mercier's Fine Furnishings Pte Ltd & Anor v Italcomm (Malaysia) Sdn Bhd [1996] MLJU 365; [1996] 3 CLJ 590, HC (refd)

Lee Weng Kin v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1991] 2 MLJ 472, SC (refd)
Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors [2001] 2 CLJ 385, CA (refd)
Lim Guan Eng v Utusan Melayu (M) Bhd [2012] 2 MLJ 394; [2012] 2 CLJ 619, HC (refd)
MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & Other Appeals [1995] 2 MLJ 493; [1995] 2 CLJ 912, CA (refd)
Manoharan Malayalam & Yang Lain lwn Menteri Keselamatan Dalam Negeri Malaysia & Satu Lagi [2009] 4 CLJ 679, FC (folld)
Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals [2002] 4 MLJ 449; [2002] 4 CLJ 309, FC (refd)
Morgan v Odhams Press Ltd and another [1971] 2 All ER 1156, HL (refd)
Raveychandran s/o Goonydo v Datuk Abdul Kadir Jasin & Anor and Another Action [1997] MLJU 344; [1997] 3 CLJ Supp 68, HC (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)
Tan Kay Teck & Anor v The Attorney-General [1957] MLJ 237 (folld)
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)
Ummi Hafilda bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (PAS) & Ors [2006] 4 MLJ 761; [2006] 3 CLJ 252, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2), Schedule, para II
Defamation Act 1957 s 8
Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 3(1)
Evidence Act 1950 ss 63, 63(1)(c), 65
Federal Constitution art 5, 5(3), 9, 10, 13, 149, 150, Part II
Government Proceedings Act 1956 ss 5, 6
Internal Security Act 1960 ss 8, 8(7), 8B, 8C, 25(2), 63(1)(c), 73, 73(1), (1)(a), (3), (3)(a), (b), (c)
Official Secrets Act 1972 s 123
Police Act 1967
Rules of Court 2012 O 59 r 16

Ranjit Singh s/o Harbinder Singh (Razlan Hadri Zulkifli, Ho Kok Yew and Yong Woon Yee with him) (Owee & Ho) for the plaintiffs.
Azizan bin Md Arshad (Iznan bin Ishak, Normastura bt Ayub, Low Jiah Yee, Shaiful Nizam Shahrin and Nur Aqilah bt Ishak with him) for the defendants.

Lau Bee Lan J:

[1] In this suit only the second, third, fourth, fifth and sixth plaintiffs ('referred to as 'the plaintiffs' unless specifically referred otherwise') are

proceeding with the action against the defendants. The first, seventh and eighth plaintiffs are no longer pursuing the same against the defendants.

[2] The plaintiffs' claim are for general, aggravated and exemplary damages against the defendants for:

(a) the tort of false/unlawful arrest and detention; and

(b) the tort of defamation.

[3] The salient facts of the case are these. The first defendant was at all material times the Inspector-General of the Royal Malaysian Police. The second defendant, being the Home Minister of Malaysia, was at all material times the Minister responsible in respect of orders made under s 8 of the Internal Security Act 1960 ('ISA'). The third defendant, being the Government of Malaysia, is vicariously liable for the acts of the first and second defendants and the various police officers alluded to in the statement of claim.

[4] On 10 April 2001, the second, third and fourth plaintiffs were arrested and detained by the police under s 73(1) of the ISA.

[5] On 11 April 2001, a day after the second, third and fourth plaintiffs were arrested, the first defendant held a press conference at the police headquarters at Bukit Aman, Kuala Lumpur, whereby a press statement (exh D2, bundle G pp 1–3)('the press statement') in respect of the plaintiffs' arrest was issued to the press. The second, third and fourth plaintiffs contend that the first defendant's allegation of them being involved in militant activities were untrue; the publication is defamatory of them and was published maliciously and the first defendant has no justifiable reason to support their defence of qualified privilege.

[6] Several major local newspapers, amongst which were the *NST*, *Berita Harian*, *Utusan Malaysia* and *Harian Metro* carried the news on 12 April 2001 (exhs P3, P5, P6 and P7 in bundle G pp 4–5, and 8–12 respectively) which reported the first defendant to have said that several other related arrests were forthcoming.

[7] The fifth and the sixth plaintiffs were arrested and detained on 26 April 2001 and 20 April 2001 under s 73(1) of the ISA respectively. Their arrests reported in the newspaper reports of *The Malay Mail* of 20 April 2001, *Berita Harian* of 21 April 2001 and the *NST* (exhs P11, P12 and P13 in bundle G pp 13–17 respectively) referred specifically to the earlier reports on 12 April 2001.

[8] For ease of reference the period of detention for each plaintiff under s 73(1) of the ISA and s 8 of the ISA as tabulated by the senior federal counsel acting for the defendants is adopted:

[9] As a whole, the period of detention in respect of each plaintiff is as follows:

No	Plaintif-Plaintif	Tempoh Masa Tahanan		
		Seksyen 73	Seksyen 8	Jumlah
1	Chua Tian Chang	53	730	783
2	Hishamudin bin Rais	53	730	783
3	Saari bin Sungib	52	782	834
4	Badaruddin bin Ismail	41	–	41
5	Badrulamin bin Bahron	54	730	784

[10] Having considered the written submissions of the parties, the findings of the court are stated below.

RES JUDICATA

[11] The plaintiffs contend the Federal Court's decision in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309 has effectively rendered the point on false/unlawful arrest and detention pursuant to s 73(1) of the ISA 1960 res judicata in the plaintiffs' favour and is no longer open for the defendants to argue otherwise.

[12] With respect the court cannot agree with the plaintiffs' contention. The court agrees with the defendants that the principle of res judicata is not applicable for the issue of an arrest under s 73(1) of the ISA for the following reasons:

(a) a civil claim for false imprisonment/unlawful detention is a claim for damages as is the relief sought by the plaintiffs in this instant case whilst an application for habeas corpus is to obtain immediate release of the detainee. Support for this proposition is aptly depicted in the passage from '*The Law of Habeas Corpus*' by RJ Sharpe at p 59:

> False imprisonment is not a remedy which takes the place of habeas corpus as it will not ordinarily be used to obtain immediate release from a restraint, but it does afford one means of redress for anyone who has been unlawfully imprisoned. A civil action in damages will only succeed where there has been an absence or excess of jurisdiction. Moreover, it by no means follows that success on habeas corpus, even on the grounds of jurisdictional error will afford the basis for an action in false imprisonment. The matter is not res judicata …

(b) in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals*, the Federal Court:

> (i) merely decided on the issue of whether the ground of detention is legal and is in accordance with procedure or not and the decision was premised on affidavit evidence filed by the police personnel who arrested the plaintiffs; and (ii) held the respondent did not satisfy the court based on the affidavit evidence filed and not based on the oral testimonies of witnesses and documentary evidence as in this instant case.

(c) the oral testimonies of the witnesses and the documents marked 'M, N, O, P, and Q' at this stage is fresh evidence that had not be produced before the Federal Court and has not been decided on the merits; and

(d) the issue to be decided in this present case is different from that decided at the Federal Court stage in *Mohamad Ezam Mohd Noor* as held in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57; [1997] 2 CLJ 104 at p 105 (Held 3) that res judicata applies where the parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication.

UNLAWFUL ARREST

[13] In the event I err in my finding that that the argument of res judicata does not favour the plaintiffs, I shall now address whether the plaintiffs have proven that they were wrongfully arrested and detained by the police under s 73 of the ISA.

(a) The plaintiffs not informed of 'grounds' of arrest

[14] For convenience, both ss 73(1) and 8 of the ISA is reproduced:

> Power to detain suspected persons.
>
> 73(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe — (a)that there are grounds which would justify his detention under section 8; and (b)that he has acted or is

about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

Section 8(1) provides:

Power to order detention or restriction of persons.

8 (1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as 'a detention order') directing that that person be detained for any period not exceeding two years.

[15] The police officers involved in this exercise and the period of detention of the respective plaintiffs are clearly seen in the chart drawn up by the defendants:

Plaintif	Pegawai Tangkap (Arresting Officer)	Pegawai Lanjut Tahanan (Officer in charge of executing the detention extension orders)	Pegawai Soal Siasat (Interrogating Officer)	Pegawai Kes Fail (Case File Officer)
Ke-2 (Chua)	DSP Lam Kuan Loy (DW2)	24 jam: Insp Wong Lang Eng (DW9) 48 jam - 30 hari: ASP Cheah Kee Sam (DW8) 31 hari - 60 hari: DSP Hj Jaafar Bin Hamid	ASP Pang Jin Lai (DW18)	ASP Lim Soon Lye (DW12)
Ke-3 (Hishamudin)	ASP Fadzil Bin Hj Mohd Sih (DW1)	24 jam: Insp Wong Lang Eng (DW9) 31 hari - 60 hari: DSP Hj Jaafar Bin Hamid	48 jam - 30 hari: ASP Cheah Kee Sam (DW8)	ASP Zulkepli Bin Hasim (DW15) ASP Md Isa Bin Hassan (DW13)
Ke-4 (Saari)	ASP Samsudin Bin Basir (DW4)	24 jam: Insp Wong Lang Eng (DW9) 48 jam - 30 hari: ASP Cheah Kee Sam (DW8) 31 hari - 60 hari: DSP Hj Jaafar Bin Hamid	DSP Mohd Ariff Bin Ariffin (DW17)	ASP Mohd Azhar Bin Mohd Hanafiah (DW10)
Ke-5 (Badaruddin)	ASP Ibrahim Bin Omar (DW5)	24 jam: Insp Sofian Bin Saad (DW7) 48 jam - 30 hari: ACP Rorete @ Clarence Ak Sagon (DW6) 31 hari-60 hari: DSP Abd Rashid Bin Abd Hamid	Supt Muhd Khalid Bin Mustapha (DW16)	ASP Mohd Yusof Bin Che Me (DW14)

Ke-6 (Badrulamin)	ASP Roslan Bin Abu Samah (DW3)	24 jam: Insp Wong Lang Eng (DW9) 48 jam - 30 hari: ASP Cheah Kee Sam (DW8) 31 hari - 60 hari: DSP Lam Kuan Loy (DW2)	Md Shahir Bin Safrir (DW19)	Pemangku DSP Roslan Bin Alias (DW11)

[16] The plaintiffs testified that they were not informed of their 'grounds' of arrest (as to the arguments on what constitute 'grounds' of arrest will be addressed later).

[17] The defendants contend otherwise. The arresting officers in respect of Chua, Hishamudin, Saari, Badaruddin and Badrulamin, namely, DSP Lam, ASP Fadzil, ASP Samsudin, ASP Ibrahim, and ASP Roslan all respectively stated pursuant to s 8 of the ISA, they informed the respective plaintiffs verbally at the time of arrest and in writing through the 'Borang 5(3) Perlembagaan Persekutuan' (exhs D28, D25, D35, D39 and D33 all in bundle H p 2 respectively) ie that there were grounds which would justify their detention under s 8 of the ISA and /or that they have acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia.

[18] The defendants contend that the arresting authority is not required to inform the arrested person of the grounds of arrest but to merely inform that he is arrested under the ISA relying on the case of *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* [2003] 1 MLJ 321 and *Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* [2010] 6 MLJ 329; [2010] 8 CLJ 656 (CA).

[19] In *Kam Teck Soon*, the arresting officer affirmed that he informed he had told the appellant that he was arrested under s 3(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 as there was reason to believe there were grounds that would justify the appellant's detention; however he did not disclose to the appellant the information received that caused him to have reason to believe that there were grounds justifying the detention. On appeal, one of the issues raised by the appellant's counsel was the arrest and detention of the appellant violated the first limb of art 5(3) of the Federal Constitution and consequently, the arrest and detention were improper.

[20] At p 332D–I the Federal Court held:

> (a) … Furthermore, s 3(1) only requires the arresting officer to have 'reason to believe that there are grounds …' It does not require the grounds to be informed to the arrested person …

(b) And even if it it so required because of art 5(3) of the Constitution, I am of the view that what the arresting officer had informed the appellant was sufficient compliance with art 5(3).

quoting a passage of Viscount Simon in *Christie & Anor v Leachinsky* [1947] 1 All ER 567 at p 572:

> 4 The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraint on his freedom *if he knows in substance the reason* why it is claimed that this restraint should be imposed. (Emphasis added.)
>
> (c) If I am wrong in my view that what had been communicated to the appellant by the arresting officer is a sufficient compliance of art 5(3) of the Constitution, then it is my opinion that art 150(2) and (6) of the Constitution clearly show that the provisions of the Ordinance must prevail over the Constitution. Furthermore s 3(5) of the Ordinance which reads:
>
> > Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar place authorized generally or specially by the Minister.

[21] In *Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* [2010] 6 MLJ 329; [2010] 8 CLJ 656, the Court of Appeal reversed the decision of the High Court in *Abd Malek Hussin*; disagreed with the proposition of the need to inform a detainee pursuant to s 73(1)(a) of the ISA of the grounds of his arrest in detail. Essentially the reasons are:

(a) the arrest was not an ordinary arrest, but an arrest under the ISA. The ISA is a special law made under art 149 of the Federal Constitution, which expressly provides that the ISA remains valid notwithstanding that it is inconsistent with arts 5, 9 or 10 and 13 of the Federal Constitution;

(b) the ruling in the Federal Court case of *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* was preferred over that of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals*; and

(c) the Court of Appeal adopted the reasoning of *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* where the Federal Court:

(i) at p 235 of the judgment held:

> In the light of art 150(2) and (6) of the FC (Federal Constitution), s 3(1) of the Ordinance (Emergency (Public Order and Prevention of Crime) Ordinance 1969) clearly cannot be contended to be invalid just because it is

inconsistent with art 5(3) of the FC. What is the purpose of not invalidating s 3(1) if it is not for validating an arrest or detention which becomes unlawful due to non-compliance of art 5(3)? I am of the view that if s 3(1) is inconsistent with art 5(3) then s 3(1) must prevail over art 5(3). This would save the arrest and detention which would have been unlawful because of violation of art 5(3). This in my view is the purpose of art 150(6) of the FC;

(ii) referred to in para 14.1 above (see paras 32–33 of CA judgment in *Borhan bin Hj Daud & Ors v Abd Malek bin Hussin*.

[22] I am mindful I am duty-bound to follow the Court of Appeal judgment in *Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* and the Federal Court judgment in *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* (see *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 at p 647). However, with the greatest respect, regretfully, I humbly beg to differ. As I understand it the plaintiffs argued the resulting decision of both judgments were misconceived.

[23] I find the arguments ventilated by the plaintiffs below bear merit and are of substance:

(a) the emphasis of both these cases is the 'inconsistency' between the provisions of the ISA and the provisions of the Federal Constitution as contained in Part II of the Federal Constitution titled 'Fundamental Liberties'. The provision of the ISA which is in focus now is s 73 of the ISA which seek to depart from the fundamental liberty of a person, particularly art 5(1) by allowing the person to be arrested and detained on the mere belief that such a person has acted or is about to act in a manner prejudicial to the security, maintenance of essential services or economic life of the country;

(b) arts 149–150 of the Federal Constitution are designed to protect the legality of the preventive detention laws; they validate the provisions of the ISA and likewise they cannot validate provisions that do not appear in the ISA. In this context the right to be informed of the grounds of arrest relates to procedure which is to be followed following the arrest. The ISA does not contain any provisions which explicitly allow the police the power not to inform the arrested person of the grounds of arrest. In the absence of any specific provision in the ISA that takes away the right of the arrested person to be informed of the grounds of arrest, the arrested person's fundamental right enshrined in art 5(3) of the Federal Constitution must necessarily prevail as per Siti Norma Yaakob FCJ in *Mohamad Ezam* when dealing with the issue of the second limb of whether there was a breach and the effect of the breach of art 5(3) of the FC at p 389 be opined 'The ISA makes no provision for denial of access to legal representation which would be inconsistent with art 5(3). As such

A the ISA is still subject to the rights entrenched in art 5(3) and art 149 cannot be used to remove such a right';

(c) if Parliament had intended for the police to be able to arrest under s 73(1) of the ISA without the need to inform the arrested person the grounds of the arrest, it would have so worded in s 73(1) itself which by virtue of art 149 would have been legal to not inform the arrested person of his ground of arrest;

(d) art 149 states the ISA remains valid even if it is inconsistent with art 5 and there is nothing in the Federal Constitution to say that art 5 is invalid because of the ISA;

(e) The Court of Appeal in *Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* and the Federal Court in *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* did not refer to the Federal Court case of *Karam Singh v Menteri Hal Ehwal Dalam Negeri [Minister of Home Affairs], Malaysia* [1069] 2 MLJ 129; [1969] 1 LNS 65 whereby the Federal Court propounded the principle that the grounds of arrest are to be distinguished from the purposes provided in s 8 of the ISA following which the grounds of arrest must necessarily entail particulars quite apart from that provided in s 8 of the ISA alone. This proposition was adopted in the dissenting judgment of Malek Ahmad JCA (as he then was) in the Court of Appeal case in *Gurcharan Singh a/l Bachittar Singh @ Guru v Penguasa Tempat Tahanan Perlindungan Kemunting, Taiping & Ors* [2000] 2 MLJ 1 at p 16; [2000] 1 CLJ 625 at p 652f–i:

> I would like to stress the point that 'purposes' and 'grounds' are two different things. The purposes are as stated in sub-s (1) of s 8 of the Act but the grounds for detention must be given in the statement in writing as provided for in sub-para, (i) of para, (b) of sub-s (2) of s 11 of the Act together with the allegations of fact and other particulars as stated in sub-paras, (ii) and (iii) of that same paragraph.
>
> Accordingly, the words 'the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof in sub-s (1) of s 8 of the Act are definitely not the grounds for detention but only the purposes for the detention.
>
> My view is strengthened by the use of the word 'purposes' in sub-s (5) of s 8 of the Act which begins with 'If the Minister is satisfied that for any of the purposes mentioned in sub-s (1) …'. So when the words 'acting in any manner prejudicial to the security of Malaysia' appear in both the detention order and the extension order, they do not qualify as a ground for detention but only as a purpose for the detention.;

(f) (i) On an appeal to the Federal Court (notwithstanding the Federal Court ultimately set aside the order made by the High Court which

held that the extension order made under s 8(7) of the ISA was null and void and of no effect), Ahmad Fairuz FCJ (as he then was) (delivering the judgment of the FC) supported this principle and agreed with this part of Malek Ahmad JCA dissenting judgment in *Gurcharan Singh a/l Bachittar Singh @ Guru v Penguasa, Tempat Tahanan Perlindungan Kemunting, Taiping & Ors* at p 256g:

> For the reasons given by the learned judge (Malek Ahmad JCA) I agree that s 8(1) merely specifies the three purposes for detention. Thus in the context of the aforementioned relevant provisions of the Act, the grounds must mean the grounds referred to in s 11 of the Act …');

(ii) However in agreeing with the majority judgment of the Court of Appeal, His Lordship with respect acted in a self-contradictory fashion. I agree with the analysis of the inconsistency made by His Lordship Hishamudin Mohd Yunus J (now JCA) in *Badrul Zaman PS Md Zakariah v Superintendent, Preventive Detention Centre, Kamunting & Ors* [2011] 4 CLJ 873 at p 900 at para 51:

> [51] With respect, I find great difficulty in reconciling this part of the judgment of Ahmad Fairuz FCJ with the earlier part of His Lordship's judgment. If he had agreed with the interpretation on ss 8(1), 8(5), 8(7) and 11(2)(b)(i) of the ISA as given by Abdul Malek Ahmad JCA (particularly, that part of the judgment of Abdul Malek Ahmad JCA that states that s 8(1) when read with s 8(5) provides for the purposes of the detention and not the grounds for the detention; and that the word 'grounds' in s 11(2)(b)(i) and s 8(7) means something else, and that 'grounds' are distinct from 'purposes'), he cannot in the same breath say that he also agreed with the interpretation as given by NH Chan JCA that the word 'grounds' in s 11(2)(b)(i) and s 8(7) means the purpose or purposes for detention specified under s 8(1).
>
> But if at all the case of Gurcharan Singh is of some relevance it is because of the dissenting judgment of Abdul Malek Ahmad JCA (in the Court of Appeal) and some parts of the judgment of the Federal Court that supports the view of Abdul Malek Ahmad JCA and thereby indirectly supports the contention of the plaintiff in the present case on the interpretation of ss 8 and 11 of the ISA.

(g) as can be seen from the grounds above, I am of the view the argument hinges on the interpretation of a section in a statute and hence with the greatest of respect, I cannot agree that the Federal Court judgment in *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors and other appeals* is an example of a true precedent as the defendants seek to contend. (*Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136; [2007] 4 CLJ 526 (CA) at p 145 (MLJ); p 537 (CLJ) if it can be demonstrated that the Federal Court in its interpretation of statutes or sections had decided in per curiam 'no court in this country need to follow it').

[24] Thus following the aforesaid reasoning, I agree with the plaintiffs' contention the arresting officers must inform the plaintiffs the 'grounds' of arrest at the point of arrest and there must be sufficient material particulars to show the basis of the reasons to believe that the detention of the plaintiffs was necessary to prevent them from acting in a manner prejudicial to the security of the country; and not the mere regurgitation by the arresting officers that they had reason to believe that the detention of the plaintiffs was necessary to prevent them from acting in a manner prejudicial to the security of the country or the production of the respective 'Borang 5(3) Perlembagaan Persekutuan' falls foul of the Federal Constitution.

[25] Having taken such a position, I find based on the evidence adduced from the arresting officers during the trial and as aptly summarised by the plaintiffs in their submission the following:

(a) they had no personal or direct knowledge of what the plaintiffs had done prior to the arrests;

(b) they were not directly or personally involved in the intelligence gathering exercise prior to the plaintiff's arrests;

(c) they only had knowledge to the extent they were informed by other police officers; and

(d) that apart from the mere contention that they each had reason to believe that the plaintiffs were a threat to national security, no particulars were divulged to substantiate their said belief.

UNLAWFUL DETENTION

[26] Next, I turn to the issue of on the legality of the extension of the s 73(1) detention and whether the provisos to s 73(3) of the ISA has been complied with. Section 73(3)(a)–(c) of the ISA is reproduced:

> (3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:
>
> Provided that:
>
> (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
>
> (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and
>
> (c) he shall not be detained for more than thirty days unless a police officer of

or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister.

[27] The officers in charge of executing the detention extension orders pursuant to:

(a) s 73(3)(a) of the ISA ie detention beyond 24 hours in respect of Chua, Hishamudin, Saari and Badrulamin was Insp Wong (SB Form 28A(Revised) exhs D51, D52, D53 and D54 all in bundle H p 4) whilst Insp Sofian extended the order in respect of Badaruddin (SB Form 28A (Revised) exh D46 in bundle B p 4);

(b) s 73(3)(b) of the ISA ie detention beyond 48 hours in respect of Chua, Hishamudin, Saari and Badrulamin was ASP Cheah (SB Form 28 (Revised) exhs D47, D48, D49 and D50 all in bundle H p 4) whilst ACP Rorete extended the order in respect of Badaruddin (SB Form 28A (Revised) exh D45 in bundle B p 4); and

(c) s 73(3)(c) of the ISA ie detention from 31–60 days in respect of Chua, Hishamudin, Saari was DSP Hj Jaafar (SB Form 29 exhs D41, D42, D43 and D50 all in bundle H p 5) whilst DSP Abdul Rashid and DSP Lam extended the order in respect of Badaruddin and Badrulamin respectively (SB Form 29 exhs D62 and D55 in bundle H p 5).

[28] The defendants contend they have complied with the forms under s 73(3)(a)–(c) of the ISA relying on the dicta of the Court of Appeal in *Borhan Hj Daud & Ors v Abd Malek Hussin* at p 673 para 36:

> [36] We would like to point out that the forms used under s 73(3)(a), (b) and (c) are merely administrative forms. Section 73(3) does not refer to any form to be used by the police officers referred to thereunder to exercise their powers. Thus, the insufficient particulars in those forms, will have no legal impact and cannot be considered as a basis for censuring the legality of detention under s 73(1) of the ISA. Section 73(3)(a), (b) and (c) only require that any extension must be authorised by the police officers of the relevant rank. There is no requirement for the SD9, SD10 and SD8 to explain and give sufficient particulars in extending the respondent's detention. In this case, the relevant forms have been signed by the relevant officers of the required rank. It indicates that the authorisation for the said sub-section have been complied with. A close and careful reading of s 73(3)(a), (b) and (c) indicate that it is never the intention of the legislature for the officers authorising the further detention to state or explain the reasons for authorising the detention.

[29] The plaintiffs basically submit:

(a) the defendants have fallen short of the principles in the exercise of power

to authorise further detention pursuant to paras (a)–(c) of the proviso to s 73(3) of the ISA gleaned from the judgment of Hishamudin Mohd Yunus J (now JCA) in *Abdul Ghani Haroon v Ketua Polis Negara and another application (No 3)* [2001] 2 MLJ 689 at p 722; [2001] 2 CLJ 709 at p 723 a–b. They are:

(a) The power to authorise further detention must be exercised reasonably and fairly;

(b) The purpose of the provisos to s.73(3) of the ISA is to provide a built in departmental safeguards against possible abuse of the powers of arrest and detention under the ISA;

(c) In order to achieve this purpose, the officers concerned must be objective, independent minded and professional in their approach;

(d) The officers concerned must make their own judgment without fear or favour;

(e) The discretion is solely theirs and their superiors cannot direct or influence them in deciding whether or not to authorise the further detention; and

(f) The court must and, indeed, has the power to evaluate the exercise of the discretion.

(b) in the circumstances the defendants had failed to discharge the burden of proving that the officers responsible for extending the plaintiffs' period of detention whilst in police custody had in fact applied their minds to the circumstances when deciding to extend and had dutifully complied with strict instructions from their superiors to rubber stamp the extensions rendering the various extensions as unlawful.

[30] The Court of Appeal in *Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* in paras 34 and 38 at pp 346–347 (MLJ); 672–673 (CLJ) had dealt with the issue of extension of detention wherein it reversed the High Court's decision in *Abdul Ghani Haroon* where His Lordship Hishamudin Yunus J (now JCA) followed his reasoning in the latter judgment which was substituted by the Court of Appeal in the manner alluded to in para 21 above. The Court of Appeal's decision in *Borhan Hj Daud & Ors v Abd Malek Hussin* is binding on this court. However as correctly pointed out by the plaintiffs, it does not detract from the fact that (a) the Federal Court in *Mohamad Ezam*, on the facts of the case has declared the appellants' detention to be unlawful, tainted with mala fides; and (b) the said decision remains good and binding on this court until it is set aside by the Federal Court itself (see *Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1997] 2 MLJ 829; [1997] 3 CLJ 365 (FC) at pp 372f–374a, *Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & another application* [2005] 3 MLJ 1; [2004] 4 CLJ 350 (FC) at

pp 365b–366b).

MALA FIDES

[31] Turning to the point on mala fides, in *Mohamad Ezam Mohd Noor v Ketua Polis Negara & Other Appeals*, one of the principal grounds that the Federal Court held the detention of the appellants as mala fide and unlawful is that at the time of arrest, the police must already have reason to believe that the appellants were a threat to national security and not arrest them for the purpose of building a case against them with the intention of getting enough evidence to get the Minister's order to detain them under s 8 of the ISA (see p 327 h–i to p 328 a–d).

[32] Based on the evidence in this present case, the arresting officers, DW1, DW2, DW3, DW4 and DW5 testified essentially that prior to their arrests (a) they had no personal or direct knowledge of what the plaintiffs had done; (b) they were not directly or personally involved in the intelligence gathering exercise and they had knowledge to the extent that was informed to them by other police officers eg DW2 and DW4 were briefed by Dato' Fuzi, DW3 was briefed by ACP Wong Nam Fei and DW5 was briefed by SAC1, Dato' Salamudin and (c) there were other police officers who were involved in the intelligence gatheringas in DW7 and DW6 who relied on the 'laporan ringkas' of ASP Mohd Yusof bin Che Me, DW8 relied on the 'laporan ringkas' of ASP Lim Soon Lye; (d) ASP Mohd Azhar testified that the 'laporan ringkas' was prepared by special branch officers; similarly ASP Lim Soon Lye testified he was responsible for gathering information from 'laporan risikan' obtained from 'sumber-sumber Cawangan Khas'.

ADMISSIBILITY OF THE REDACTED DOCUMENTS

[33] The plaintiffs contend that the evidence before the court is all hearsay as essentially, the only people who have first-hand knowledge and who could give evidence of the purported unlawful/militant activities of the plaintiff were the intelligence officers of the special branch; none of whom were called as witnesses.

[34] On the other hand the defendants opposed submitting that all the relevant witnesses responsible for arresting and detaining the plaintiffs were called to testify in relation to the documents classifed as 'Rahsia' although the defendants objected to the admissibility of the said documents.

[35] For purposes of the trial, these documents which the defendants sought to admit but were opposed by the plaintiffs were referred to as 'redacted documents' / 'Rakaman Percakapan' as parts of the documents were redacted or

selectively blanked out and marked strictly for ease of reference as bundles 'M', 'N', 'O', 'P' and 'Q' or IDD67, IDD68, IDD69, IDD70 and IDD71 respectively, purely to enable the court to convert the same to exhibits if the court rules they are admissible as evidence. At this juncture it is appropriate to determine the admissibility of the redacted documents.

[36] Based on the evidence elicited from the investigating officers, DW18, DW15, DW17, DW16 and DW19, it is gleaned the genesis of the redacted documents came about in this manner as aptly described by the plaintiffs:

(a) The investigating officers would take hand-written notes of what was allegedly said by the plaintiffs;

(b) These hand-written notes would then be transcribed by typing the hand-written notes;

(c) The hand-written notes themselves are destroyed;

(d) The type written versions of the redacted documents are also lost.

[37] The defendants contend the redacted documents are admissible as evidence as the makers of the documents are called as witnesses to confirm that the contents of the redacted documents is the same as the original. Be that as it may the reception of the redacted documents is still subject to the provisions of the Evidence Act governing the same.

[38] I am of the view that the redacted documents are inadmissible for the following reasons as submitted by the plaintiffs.

[39] The hand written notes are primary evidence of the redacted documents and these notes cannot be produced. However under the Evidence Act 1950, secondary evidence (s 63) can be produced and admissible as evidence in certain circumstances under s 65 of the same.

[40] The redacted documents currently produced in court are photocopies of the type written version. The type written version is secondary evidence under s 63(1)(c) of the Evidence Act being 'copies made from or compared with the original'. Hence the redacted documents are copies of a copy. Such copies are not receivable in evidence unless one can compare with the originals (*Sarkar on Evidence* pp 1888 to 1194 at p 1193). In this present case, as alluded to earlier, the originals, the hand written notes are destroyed and the type written versions of the redacted documents are also lost.

[41] A copy is only a copy if it is a full reproduction of the original (see *Hindustan Construction Company Ltd v Union of India* AIR 1967 SC 526; 1967

SCR (1) 543 which case has been followed in the Supreme Court case of *Lee Weng Kin v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1991] 2 MLJ 472, at pp 473–474).

[42] The defendants argued the unredacted parts of the redacted documents is admissible under s 123 of the Official Secrets Act 1972 whereby the 'pengarah cawangan khas', being the officer at the head of department concerned' had produced a certificate allowing the unredacted portions to produces as evidence.

[43] The *pengarah cawangan khas* was Datuk Mohd Yusof bin Abdul Rahaman who issued the certificates to produce several portions in respect of the 'Rakaman Percakapan' of Chua, Hishamudin, Saari, and Badrulamin vide 'Surat Kuasa Memberi Keterangan Untuk Mengemukakan Dokumen Berperingkat Di Mahkamah' (exhs D59, D56, D57, D61). It is observed that all the said certification are dated 23 August 2006. However the redacted documents were only produced in court during trial in 2012. In fact the 'Surat Kuasa' issued by Datuk Mohd Yusof bin Abdul Rahaman cannot be used to produce the unredacted portions of the redacted documents as the he was no longer the 'pengarah cawangan khas'. In fact this matter is fortified when the 'surat kuasa' in respect of Badaruddin which was only issued on 14 March 2012 was signed by Datuk Seri Akhil bin Bulat, presumably the present 'pengarah cawangan khas'. Therefore I agree with the plaintiffs' submission that this part of the redacted document is inadmissible.

[44] Having ruled that the redacted documents are inadmissible, I find the defendants have no credible evidence to rebut the plaintiffs' evidence that the defendants were acting mala fide. Despite the first defendant's press statement issued on 11 April 2001 and reported in several newspapers alluded to earlier that the plaintiffs' arrests were due to intelligence gathering that they were involved in secret plans to conduct mass assemblies employing militant activities which would escalate into violent street demonstrations, I find there is no material evidence in support of the same.

[45] DW15 testified that interrogations of Hishamudin had already stopped on the 30th day of his detention and the additional days were required as the police had not by then received word from the Minister in respect of the s 8 of the ISA detention.

[46] The plaintiffs have adduced evidence, the essence of which I find has been succinctly highlighted by the plaintiffs as follows:

(a) detailed evidence that the police interrogation and investigations

conducted on them after their arrest had no connection with the lucid allegations as contained in the first defendant's press statement;

(b) the tenor of the questioning hinged on their political views and beliefs, their involvement in street demonstrations, the leaders of the opposition parties, Dato' Seri Anwar Ibrahim's sexual activities, sexual allegations, the Lunas by-election and the source of funding of Parti Keadilan;

(c) no questions were asked on the plaintiffs' alleged involvement in militant activities or efforts to overthrow the government by force, as was the purport according to the press statement given by the first defendant to the press at large on 11.4.2001; and

(d) the interrogating officers in cross-examination admitted that the questions asked during interrogation were not material to the security of the nation, which ran contrary to the contents of the affidavits affirmed by the interrogating officers contemporaneous with the habeas corpus application then.

[47] In *Mohamad Ezam*, the Federal Court at p 332 d–f held on the facts of the case based on affidavit evidence the defendants have discharged the burden of proving the defendants have acted mala fide in the arrest of and detention of the plaintiffs under s 73 of the ISA 'when a power is exercised for a collateral or ulterior purpose ie for a purpose other than the purpose for which it is professed to have been exercised'. Following *Mohamad Ezam*, I find a fortiori in this instant case where there is oral evidence to like effect, it cannot be gainsaid the plaintiffs have likewise proven the existence of mala fides on the part of the defendants in arresting and detaining the plaintiffs under s 73 of the ISA.

[48] Contrary to the contention of the defendants that they provided the plaintiffs treatment accorded to other detainees, I find the plaintiffs have led sufficient evidence of the inhumane treatment during detention. For this purpose I shall adopt the examples summarised in the plaintiffs' submission as follows:

(a) being handcuffed and blindfolded upon arrest and when travelling from one place to another within the police detention centre;

(b) being made to remove clothes and change before the police officers;

(c) not supplied with any underwear;

(d) made to walk around barefooted during the initial period of detention;

(e) made to wear outfit which was thick and uncomfortable;

(f) spectacles confiscated;

(g) cell conditions were deplorable and shameful — small, filthy, dusty, riddled with cobwebs, graffiti and bird droppings, hot, limited air ventilation, devoid of decent amenities for personal hygiene, deprived of comfortable lighting, a wooden board/plank on a concrete slab for a bed;

(h) made to walk barefooted into a filthy toilet with faeces strewn on the floor;

(i) dragged, pushed and gruffly ordered around;

(j) made to walk in the rain with no umbrella;

(k) deprived of the basic amenities to perform Muslim prayers during initial period of detention;

(l) prolonged interrogation sessions with extremely limited breaks in between;

(m) demeaning, severe and stressful interrogation techniques employed;

(n) restrictive and threatening conditions during meeting with family members.

SECTION 8 DETENTION

[49] Essentially, the defendants submit the s 8 detentions of the plaintiffs is a matter which cannot be determined by the court on two grounds. Firstly, the defendants contend the matter had already been decided in the case of *Mohamad Ezam* by the Federal Court as valid and proper and the matter of false/unlawful detention pursuant to s 8 of the ISA is res judicata citing *Chung Khiaw Bank (Malaysia) Bhd v Tio Chee Hing* [2004] 3 CLJ 59 (CA) at pp 62–63, para 11 of the Schedule to s 25(2) of the Courts of Judicature Act 1964.

[50] Whilst I accept the propositions of law on the said authorities cited as correct, with respect I cannot agree with the defendants that the issue is res judicata in this present case. The reasons are (a) the Federal Court in *Mohamad Ezam* held in a s 8 of the ISA detention, 'although s 73(1) and s 8 are connected, they can nevertheless operate quite independently of each other under certain circumstances … it cannot therefore be said that they are 'inextricably connected' (per Steve Shim CJ (Sabah and Sarawak) at pp 332–345 particularly at pp 336–337); and (b) the Federal Court did not decide that the ISA detentions of the plaintiffs on the facts of the case were valid or proper as is evident from what His Lordship Steve Shim CJ (Sabah and Sarawak) stated at p 345 '… [T]he detentions of the appellants by the police under s 73(1) [ISA] are therefore unlawful … However, as the undisputed facts show that the appellants ie first, third, fourthand fifth appellants have now been detained by order of the Minister under s 8 [ISA], the issue of whether or not to grant the writ of habeas corpus for their release from current detention does not concern us. That is a matter of a different exercise'.

[51] Secondly, the defendants submitted that the decision of the second defendant to issue the s 8 detention order against Chua, Hishamudin, Saari and Badrulamin is protected by ss 8B and 8C of the ISA.

[52] I find there is merit in the defendants' contention. My reasons are as follows. Section 8B of the ISA reads:

> 8B(1)There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> (2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 8A.

[53] Section 8C of the ISA reads:

> 8C. In this Act, 'judicial review' includes proceedings instituted by way of:
>
> (a) an application for any the prerogative orders of mandamus, prohibition and certiorari;
>
> (b) an application for a declaration or an injunction;
>
> (c) a writ of habeas corpus; and
>
> (d) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Yang di-Pertuan Agong or the Minister in accordance with this Act.

[54] In *Manoharan Malayalam & Yang Lain lwn Menteri Keselamatan Dalam Negeri Malaysia & Satu Lagi* [2009] 4 CLJ 679, Manoharan (the four other appellants agreed to be bound by the decision in *Manoharan*'s appeal) sought for a writ habeas to be issued for his immediate release for breach against the Federal Constitution. On appeal to the Federal Court against the refusal order of the learned JC, two of the primary issues are (a) the Minister's order under s 8 of the ISA was not valid as no investigation was conducted under s 73 of the ISA; (b) whether ss 73 and 8 of the ISA were 'inextricably connected'.

[55] In its judgment at p 684 the Federal Court considered ss 8B and 8C of the ISA, and on the interpretation thereof adopted a passage in another Federal Court case of *Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal* [2006] 1 MLJ 320; [2005] 4 CLJ 445:

> We shall now summarise our discussion in one sentence: a detention order made under s 8 of the ISA may only be challenged on the ground of procedural non-compliance and nothing else.

[56] The Federal Court in *Manoharan* dismissed the appeal and upheld that

the s 8 detention was valid and proper and adopted the views expressed by Steve Shim CJ (Sabah and Sarawak) at pp 336–337) on whether ss 73 and 8 are 'inextricably connected' in *Mohamad Ezam* and opined:

> Ini adalah kerana s 8 memberi kuasa kepada Menteri Keselamatan Dalam Negeri sendiri untuk membuat suatu perintah tahanan tanpa siasatan di bawah s 73 AKDN. Jelas Parlimen telah memberikan kuasa tersebut secara nyata tanpa perlu menjalani proses siasatan. Jika tidak, sudah tentu Parlimen akan menyatakan sebaliknya. Oleh itu, perintah tahanan yang dibuat di bawah s 8(1) adalah sah dan terpakai.

[57] Therefore following *Manoharan* on the facts and circumstances of this case the court is precluded from determining any challenge against the Minister's order under s 8 of the ISA save on the ground of procedural non-compliance which is not the case here.

DAMAGES FOR UNLAWFUL ARREST AND DETENTION

[58] In terms of the quantum of damages, the plaintiffs suggested that the appropriate amount for unlawful detention of 24 hours in Malaysia would be in the region of RM20,000–RM30,000 which should not be an arithmetical calculation but would have to be adjusted citing the cases of *Badrul Zaman PS Md Zakariah*, *Abdul Malek Hussin* and *Dr Sanusi bin Osman dan lain-lain lwn Datuk Ismail Che' Ros dan lain-lain* [2011] 3 MLJ 274; [2010] 3 CLJ 198. Lead counsel for the plaintiffs, Mr Ranjit Singh drew to the court's attention that the Court of Appeal has recently as of this year affirmed the High Court decision of *Dr Sanusi Osman* whereby each the plaintiff was awarded general damages of RM30,000 each and this was confirmed by the learned SFC Mr Azizan.

[59] Further, the plaintiffs urged the court to consider damages for aggravating factors for breach of the plaintiffs' constitutional and fundamental rights like the length of the period of solitary confinement and the interrogation for 19 days on matters not related to internal security citing *Abdul Malek Hussin*.

[60] The defendants on the other hand submit the latest compensatory figures for unlawful detention are in the range of RM10,000–RM15,000 and referred to the case of *Kerajaan Malaysia & Anor v Yong Moi Sin* [2010] 3 MLJ 862 where on appeal by the defendants to the High Court after the case was remitted to the sessions court (after leave was granted by the Court of Appeal), the plaintiff, a gold merchant sued for damages for and loss of reputation after being wrongly arrested and remanded on suspicion of possessing stolen items. The High Court found the learned sessions court judge award of RM10,500 to be fair and reasonable but however substituted the award of RM150,000 with

RM50,000 for loss of reputation which is part of the assessment of damages for false imprisonment on the ground the learned sessions court judge acted on some wrong principle of law by relying on three defamation cases.

[61] In *Yong Moi Sin*, in arriving at the decision of reducing the award for loss of reputation in connection with false imprisonment, Vernon Ong JC (now HCJ) stated the following at p 867H–I:

> Damages for false imprisonment includes damages for injury to liberty and injury to feelings. Injury to feelings is that indignity, mental suffering, disgrace or humiliation with any attendant loss of social status. It is another form of loss of reputation (*McGregor on Damages*, (16th Ed), at paras 1850–1851; *State of Rajasthan v Rikhabchand* AIR 1961 Rajasthan 64). Even where there has been no physical injury, substantial damages may be awarded for indignity, discomfort or inconvenience. Where liberty has been interfered with damages are given to vindicate the plaintiff's rights even though no pecuniary damages has been suffered (*Clerk and Lindsellon Torts*, (17th Ed), at pp 12–80).

[62] In my opinion the principles of law therein is equally applicable to the instant case as I have found the plaintiffs have been unlawfully detained under s 73 of the ISA. In fact the case of *Rikhabchand* is especially relevant as the plaintiff, an advocate was arrested and detained twice under a preventive detention law and alleged that both his detentions were illegal, wrongful and mala fide claiming damages totalling Rs5,100. Amongst others, with respect to the second detention, the Rajasthan High Court (Division Bench of two judges) disagreed with the court below that preventive detention does not entail loss of reputation and found the plaintiff's claim of Rs1,600 for loss of reputation was reasonable.

[63] Having regard to the trend of cases and the facts and circumstances of this case, I am of the view the award of RM15,000 per day is fair and reasonable. In this regard I adopt the comments of Whyatt CJ in the case of *Tan Kay Teck & Anor v The Attorney-General* [1957] MLJ 237 at p 240 on the question of damages albeit for false imprisonment followed by Robert CJ in the High Court of Brunei case of *Kuan Kwai Choi v AK Zaidi bin Pg Metali* [1993] 2 MLJ 207 which to my mind aptly reflects the object of compensating a private citizen for the wrong done to him in the following terms:

> It was pointed out by Scott LJ in *Dumbell v Roberts* [1944] 1 All ER 329 that where a person has been wrongfully arrested and detained, it is in the public interest that sufficient damages should be awarded in order to give reality to the protection afforded by the law to personal freedom. Furthermore, as Lawrence LJ observed in *Walter v Alltools Ltd* 61 TLR 39, a false imprisonment does not merely affect a man's liberty; it also affects his reputation.

[64] It is observed that the plaintiff in *Kuan Kwai Choi* appealed against the award of RM3,000 for wrongful imprisonment of six hours (although the learned judge at p 216 by way of obiter said had the defendant, an Inspector of the Royal Brunei Police Force been responsible for the whole period of detention of 52 hours from time of arrest till produced before a magistrates' court), he would have awarded a larger sum of perhaps B$10,000. In any event the Court of Appeal (Bandar Seri Begawan) dismissed the appeal (p 208).

[65] Thus the amount of general damages due to Chua, Hishamudin, Saari, Badaruddin and Badrulamin would be RM15,000 per day multiplied by their respective period of detention:

(a)	Chua	- RM15,000 x 53 days =	RM795,000
(b)	Hishamudin	- RM15,000 x 53 days =	RM795,000
(c)	Saari	- RM15,000 x 52 days =	RM780,000
(d)	Badaruddin	- RM15,000 x 41 days =	RM615,000
(e)	Badrulamin	- RM15,000 x 54 days =	RM810,000

[66] The court also awards aggravated damages of RM30,000 each to Chua, Hishamudin, Saari, Badaruddin and Badrulamin considering that there is a breach of their constitutional and fundamental rights including restricted meetings with family members with accompanying threats, being handcuffed and blindfolded each time when travelling from place to place within the police detention centre, the length of period of solitary detention, prolonged interrogation with extremely limited breaks employing harsh and stressful interrogations on matters not related to national security, the harrowing experience coupled with the mental torment and emotional anguish and suffering.

DEFAMATION

[67] To reiterate it is the plaintiffs' case that the first defendant libelled them:

(a) by issuing the press statement (exh D2) defamatory of the second plaintiff (Chua), third plaintiff (Hishamudin) and fourth plaintiff (Saari) and had caused to be published on 12 April 2001 in the *NST*, *Berita Harian*, *Utusan Malaysia* and the *Harian Metro* (exhs P3, P5, P6 and P7);

(b) in that he had caused to be published in the *Malay Mail* on 20 April 2001 (exh P11), *Berita Harian* and the *NST* on 21 April 2001 (exhs P12 and P13) words defamatory of the sixth plaintiff (Badrulamin); and

(c) in that by reason of the press publicity given to the arrest of the fifth plaintiff (Badaruddin) on 26 April 2001 allegedly as part of the

'reformasi' movement, the allegations made by the first defendant in respect of the other plaintiffs were associated with the fifth plaintiff and were defamatory of him.

[68] It is trite law in an action for libel, the burden of proof lies on the plaintiff to prove:

(a) the impugned words were defamatory in nature or capable of bearing a defamatory meaning;

(b) the impugned words refer to the plaintiff; and

(c) the impugned words were published to a third party.

(See *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 (HC), *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394; [2012] 2 CLJ 619 (HC) at pp 625–626, *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461 (CA) at pp 466–467, *Dato Annas bin Khatib Jaafar v Datuk Manja Ismail & Ors* [2011] 8 MLJ 747 (HC) at pp 753–755).

[69] It is also trite that the burden shifts to the defendant to prove his pleaded defence only after the three abovesaid elements have been satisfied.

WHETHER THERE WAS PUBLICATION?

[70] Tan Sri Norian Mai ('the first defendant') (DW20) admitted (a) he issued the press statement (exh P2) to the press at Bukit Aman on 11 April 2001 and (b) having read the contents, approved the contents prior to its release and publication in the relevant newspapers having wide circulation which I have alluded to earlier. There is undisputed evidence from Puan Azizan Abdul Aziz ('PW6'), the reporter with *Utusan Malaysia* and Encik Kamaruzaman Mohamead ('PW7'), the assistant news editor who wrote exh P6 were present at the press conference given by the first defendant at Bukit Aman attended by more than 20 reporters, local and foreign; and they confirmed the contents of the press statement.

[71] This was not denied by the first defendant in the defendants' defence save it was pleaded at para 119 of the defendants' statement of defence and it is the first defendant's testimony that basically he had no control on what was published by the press in the respective newspaper reports, particularly the contents and accuracy thereof. In fact publication is a non issue as the defendants in submission stated 'adalah diakui bahawa kenyataan akhbar eksibit D2 yang menjadi isu di dalam kes ini telah diterbitkan oleh defendan-defendan pada masa yang material'.

[72] For its full terms and effect and to aid in comprehension, the press statement is reproduced:

KENYATAAN AKHBAR MENGENAI PENANGKAPAN DI BAWAH AKTA KESELAMATAN DALAM NEGERI (AKDN) 1960

1 Pada 10 dan 11 APR 2001 pihak polis telah menangkap dan menahan 7 orang aktivis reformasi di bawah Sek.73(1) Akta Keselamatan Dalam Negeri (AKDN) 1960. Mereka yang ditangkap dan ditahan adalah:—

1.1 MOHAMAD EZAM bin MOHD NOR — 34 tahun;

1.2 CHUATIAN CHANG — 37 tahun;

1.3 NISAMUDDIN bin MD RAIS atau HISHAMUDDIN RAIS — 50 tahun;

1.4 SAARI bin SUNGIB — 43 tahun;

1.5 GOBALAKRISHNAN A/L NAGAPAN — 41 tahun;

1.6 RAJA PETRA RAJA KAMARUDIN — 49 tahun; dan

1.7 ABDUL GHANI bin HAROON — 36 tahun

2 Tangkapan dan penahanan ini dilakukan kerana terdapat maklumat-maklumat mengenai penglibatan mereka dalam kegiatan yang boleh memudaratkan keselamatan negara. Pihak polis perlu menjalankan siasatan yang rapi di atas maklumat-maklumat tersebut. Kegiatan reformasi yang bermula pada bulan SEP 98 merancang untuk menggulingkan kerajaan melalui demonstrasi jalanan secara besar-besaran dan bersiap-sedia untuk bertindak secara militant dengan mengambil beberapa pendekatan seperti berikut:—

2.1 Telah melaksanakan langkah-langkah tertentu untuk mendapatkan bahan letupan termasuk bom dan 'grenade launcher';

2.2 Menggunakan 'molotov cocktail', 'ball bearing' serta berbagai-bagai senjata berbahaya untuk menyerang pihak keselamatan bagi menimbulkan keadaan hum hara semasa demonstrasi jalanan di sekitar KUALA LUMPUR pada bulan OKT 1998; dan

2.3 Mendapatkan bantuan dan sokongan guru-guru silat serta mempengaruhi sebilangan bekas pegawai dan anggota keselamatan supaya menyertai gerakan mereka.

3 Bagi membendung trend militant gerakan reformasi tersebut maka pihak polis telah mengambil tindakan ke atas 28 orang aktivis reformasi di bawah Sek.73(1) AKDN 1960 antara 20 SEP 98 hingga 24 DIS 98. Tindakan-tindakan pihak polis tersebut telah dapat meredakan keadaan buat sementara waktu.

4 Pada pertengahan tahun 1999, aktiviti gerakan reformasi muncul kembali dengan berselindung di sebalik platform sebuah parti politik di mana sebilangan daripada mereka telah menjalankan kegiatan-kegiatan yang boleh mewujudkan ketegangan kaum melalui isu-isu keagamaan dan

perkauman. Ini termasuk penyebaran berita-berita palsu yang menggemparkan seperti dakwaan bahawa ramai orang Melayu telah dikristiankan semasa Pilihanraya Kecil Lunas. Ciri-ciri militant semasa Pilihanraya Kecil itu telah juga dilakukan oleh aktivis reformasi melalui perbuatan ganas dengan mengancam, mengugut dan menakut-nakutkan para pengundi serta orang ramai.

5 Pada akhir tahun 2000 aktivis reformasi telah membuat ketetapan untuk menggunakan dua pendekatan berikut bagi mencapai matlamat mereka:—

5.1 Akan terus melibatkan diri dalam proses demokrasi yang normal serta sistem pilihanraya; dan

5.1 Melalui cara-cara di luar perlembagaan dengan mencetuskan demonstrasi jalanan secara besar-besaran dan bercorak militant menjelang Pilihanraya Umum 2004.

6 Ke arah merealisasikan perancangan tersebut, satu kumpulan sulit yang dianggotai oleh lebih kurang 20 orang aktivis reformasi telah diwujudkan di KUALA LUMPUR. Sejak 6 JAN 2001 hingga 4 APR 2001, sebanyak 12 perjumpaan sulit telah diadakan oleh kumpulan ini bagi merancang untuk mempengaruhi rakyat membudayakan demonstrasi jalanan dan perhimpunan haram secara militant. Antara perancangan terpenting gerakan reformasi dalam masa yang terdekat ini adalah untuk menganjurkan demonstrasi jalanan yang dipanggil 'Black 14' secara besar-besaran di KUALA LUMPUR pada 14 APR 2001. Bagi mengelirukan pihak keselamatan, perhimpunan tersebut dipanggil 'Perhimpunan Penyerahan Memorandum Rakyat Mengenai Hak Asasi Manusia' di mana mereka merancang untuk mengumpulkan seramai lebih kurang 50,000 orang yang akan berhimpun di sekitar Kuala Lumpur. Perhimpunan serta perarakan ini berpotensi menjadi rusuhan.

7 Adalah jelas aktivis reformasi sanggup melaksanakan kegiatan-kegiatan di luar perlembagaan dan undang-undang demi mencapai matlamat mereka. Oleh itu tindakan di bawah Sek.73(1) AKDN 1960 diambil kerana pihak Polis mempercayai ada alasan-alasan untuk menahan mereka di bawah Sek.8 AKDN 1960 kerana telah bertindak dengan cara yang memudaratkan keselamatan negara.

Tarikh: 11 APR 2001.

[73] Similarly, the contents of the respective newspapers which:

(a) Chua, Hishamudin and Saari allege as defamatory are as follows:

(i) 'Secret cell' exposed
IGP: Opposition-linked members planning violent overthrow of Government
KUALA LUMPUR, Wed — Police today revealed that a 'secret cell' within the Opposition was planning to violently overthrow the

Government and its members were in the process of arming themselves with explosives, grenade launchers and petrol bombs. Inspector-General of Police Tan Sri Norian Mai said the 'secret cell' comprised 20 members who were 'very serious' in their objective.

A planned gathering of some 50,000 people to commemorate Black 14 on Saturday was to have been part of preparations towards attaining their goal, Norian told a Press conference at police headquarters in Bukit Aman.

(Black 14 is the code-name coined by the ringleaders to commemorate the conviction of former Deputy Prime Minister Datuk Seri Anwar Ibrahim on April 14, 1999. Nationwide demonstrations were to have been held on April 14 last year but these failed to materialise after police made several arrests).

Norian said the individuals had set in motion plans to organise public gatherings which would escalate into violent street demonstrations.

The IGP's revelation came in the wake of the arrests yesterday of four Opposition politicians and activists under Section 73 of the Internal Security Act.

Their actions were believed to be prejudicial to national security.

They are Parti Keadilan Nasional vice-president Chua Tian Chang (Tian Chua), 37; its Youth chief Mohamad Ezam Mohd Nor, 34; reformasi activist Hishammudin Rais, 50; and Jemaah islamiah Malaysia president, Saari Sungib 43.

Saari is also the Black 14 organising committee chairman.

Three more ringleadres were arrested today. They are Free Anwar Campaign director, Raja Petra Raja Kamaruddin, 49, and Keadilan's Nasional Youth exco member Abdul Ghani Haron, 36.

Keadilan Youth wing secretary N. Gobalakrishnan, 41, was arrested early this morning in Langkawi.

…

Describing those arrested as reformasi activists, the IGP said that police intelligence revealed that they had garnered support from certain silat organisations and had influenced former members of the armed forces and police.

…

Intelligence then had revealed that large-scale street demonstrations had been organised with the aim of toppling the Government.

Then intelligence had revealed the 'organisers' had also planned to use catapults, petrol bombs and other weapons during the demonstrations.

'Our actions defused the tense situation then,' Norian said.

In mid-1999, the reformasi movement resurfaced, but this time the activists used a political party to camouflage their objectives.

'Their activities first came to light when racial and religious issues were used to create discord among the communities. This included the spreading of rumours that Malays were being coverted to Christianity.'

Such acts, Norian added, were clearly evident during campaigning for the Lunas by-election in Kedah on Nov 29 last year.

'Their militant behavior included threatening voters and all this was being geared towards the next general election in 2004.

'The secret cell held 12 meetings between Jan 6 and April 4 this year,' Norian said.

Their objective was to influence the rakyat into participating in street demonstrations and become violent when confronting police.

'This Saturday, organisers claimed they would be gathering to submit a memorandum to the Human Rights Commission of Malaysia,' Norian said.

'Our analysis say there was a possibility it could turn into a riot.' (pp 1 and 4 the *NST* dated 12 April 2001);

(ii) Militant group held under ISA

IGP: Seven detainees part of hardcore reformasi activists who plan violent street demonstrations to overthrow govt

KUALA LUMPUR, Wed: Seven people detained under the Internal Security Act (ISA) yesterday and early today are part of a militant-type group which is prepared to use violent means to topple the government.

…

Inspector-General of Police Tan Sri Norian Mai said the seven are part of a 20-member group comprising mainly reformasi activists which has held 12 secret meetings in the city between Jan 6 and April 4.

He told a news conference at Bukit Aman this afternoon the group adopted a two-pronged strategy late last year to:

- continue its struggle through the democratic process; and
- use unconstitutional means, including militant type activities such as street demonstrations, right up to the next general election which is due in 2004.

The group's first militant action is to mobilise about 50,000 people to demonstrate in the city centre this Saturday to mark what it termed as 'Black 14' (in reference to April 14, 1999, the day Datuk Seri Anwar Ibrahim was sentenced to six years jail on four counts of corruption).

Norian said that as a decoy, the organisers have dubbed the rally as 'an assembly to hand over the people's memorandum on human rights' to the Malaysian Human Rights Commission (Suhakam).

He said the rally could develop into riots and advised the public to stay away.

Those detained are Parti Keadilan Nasional Youth chief Mohd Ezam Mohd Nor, youth exco member Abdul Ghani Harun, vice-president Chua Tian Chang @ Tian Chua and supreme council member N. Gobalakrishnan, activist Hishamuddin Rais, Jemaah Islah Malaysia president Saari Sungib and 'Free Anwar' campaign director Raja Petra Raja Kamaruddin.

Norian said that in October 1998, the group tried to acquire explosives, including bombs and grenade launchers. It also enlisted the support of silat (Malay martial art) masters and influenced scores of former military personnel to join the demonstrations by supporters of Anwar following the former deputy prime minister's expulsion from the government on Sept 2, 1998, and from Umno the next day.

Police thwarted the group's plans by rounding up 28 hardcore activists between Sept 20 and Dec 24, 1998.

In mid-1999, Norian said, the group tried to make a comeback using a political party as a platform.

'This time the group sought to incite racial tension by distorting religious matters,' he said. 'One allegation surfaced during the Lunas by-election last November, that a number of Malays were forced to convert to Christianity.'

(pp 1 and 4 *The Sun* dated 12 April 2001);

(iii) Penahanan tujuh aktivis reformasi mengikut ISA

Rancang tindakan militan

KUALA LUMPUR, Rabu - Polis hari ini menjelaskan, tujuh aktivis reformasi ditahan mengikut Akta Keselamatan Dalam Negeri (ISA) 1960 semalam dan hari ini kerana mereka merancang mempengaruhi rakyat membudayakan demonstrasi jalanan dan bertindak secara militant.

Naib Presiden Parti Keadilan Nasional, Chua Tian Chiang, 37; Ketua Pemuda Keadilan, Mohd Ezam Mohd Nor, 34; bekas aktivis pelajar, Hishamuddin Rais, 50; bekas Presiden Pertubuhan Jemaah Islah Malaysia, Saari Sungib, 43; dan Penolong Setiausaha Keadilan, N Gobalakrishnan, 41; ditahan di sini semalam.

Pagi ini, polis menahan Ketua Koordinator Keadilan, Raja Petra Raja Kamarudin, 49, di sini dan Exco Pemuda Keadilan, Abdul Ghani Haroon, 36, di Lapangan Terbang Antarabangsa Kuching.

Ketua Polis Negara, Tan Sri Norian Mai, berkata ketujuh-tujuh mereka, yang menyertai satu kumpulan sulit dianggotai kira-kira 20 orang, mengadakan 12 perjumpaan sulit antara 6 Januari hingga 4 April lalu bagi merancang perkara itu.

Antara perancangan terpenting gerakan itu dalam masa terdekat ini ialah menganjurkan demonstrasi jalanan yang dipanggil 'Black 14', Sabtu ini.

…

Memberitahu sidang akhbar di sini petang ini, Norian berkata kegiatan reformasi yang bermula September 1998, merancang menggulingkan kerajaan melalui demonstrasi jalanan secara besar-besaran dan bersiap sedia bertindak secara militant.

Katanya, antara pendekatan kumpulan itu ialah:

- Melaksanakan langkah-langkah tertentu untuk mendapatkan bahan letupan termasuk bom dan pelancar granit;
- Menggunakan bom petrol (molotov cocktail), 'ball bearing' seila pelbagai senjata berbahaya untuk menyerang pasukan keselamatan bagi menimbulkan huru-hara ketika demonstrasi di ibu negara pada Oktober 1998; dan
- Mendapatkan bantuan dan sokongan guru silat serta mempengaruhi sebilangan bekas pegawai dan anggota keselamatan supaya menyertai mereka.

Norian berkata, lebih ramai lagi aktivis reformasi akan ditangkap berkaitan perancangan kumpulan itu walaupun tidak semua mereka berpangkalan di ibu kota.

…

Menjelaskan lebih lanjut rancangan mengadakan 'Black 14', Norian berkata bagi mengelirukan pihak keselamatan, ia dipanggil 'Perhimpunan Penyerahan Memorandum Rakyat Mengenai Hak Asasi Manusia' dengan harapan dapat mengumpul kira-kira 50,000 orang.

'Perhimpunan dan perarakan itu berpotensi menjadi rusuhan, sekali gus membuktikan aktivis reformasi sanggup melaksanakan kegiatan mereka di luar perlembagaan dan undang-undang untuk mencapai matlamat.

…

Beliau berkata, kumpulan sulit itu ditubuhkan setelah aktivis reformasi membuat ketetapan akhir tahun lalu untuk menggunakan dua pendekatan selepas rancangan menggulingkan kerajaan melalui demonstrasi jalanan secara besar-besaran pada September 1998, dapat ditangani pihak berkuasa.

Katanya, pendekatan mereka ialah terus menggunakan proses demokrasi dan pilihan raya serta cara-cara di luar perlembagaan dengan mencetuskan demonstrasi jalanan secara besar-besaran dan bercorak militant menjelang pilihan raya umum 2004.'

(p 1 *Berita Harian* dated 12 April 2001);

(iv) Polis dedah rancangan cetus demonstrasi militant besar-besaran Pakatan sulit reformasi

KUALA LUMPUR 11 April - Polis hari ini mendedahkan satu kumpulan sulit yang dianggotai oleh lebih 20 orang aktivis reformasi telah diwujudkan bagi mencetuskan demonstrasi jalanan besar-besaran bercorak militant menjelang pilihan raya umum 2004.

Kumpulan tersebut didapati telah mengadakan 12 perjumpaan sulit sejak 6 Januari tahun ini hingga 4 April lalu bagi merealisasikan perancangan mereka itu.

Ketua Polis Negara, Tan Sri Norian Mai berkata, tindakan yang bercanggah dengan perlembagaan itu adalah sebahagian daripada keputusan yang dibuat oleh aktivis reformasi tersebut pada akhir tahun lalu.

…

Norian menjelaskan, sehubungan itu polis setakat ini telah menahan tujuh aktivis reformasi terbabit di bawah Seksyen 73(1) Akta Keselamatan Dalam Negeri (ISA) 1960, hari ini dan semalam.

Mereka ialah Ketua Pemuda Parti Keadilan Nasional (Keadilan), Mohamad Ezam Mohd. Noor, 34; Naib Presiden Keadilan, Chua Tian Chang (atau Tian Chua), 37; Hishamuddin Rais, 50, Saari Sungib, 43; N. Gobala Krisnan, 41; Raja Petra Raja Kamarudin, 49, dan Abdul Ghani Haroon, 36.

Norian menegaskan aktivis reformasi itu juga mempunyai perancangan terpenting dalam masa terdekat ini iaitu menganjurkan demonstrasi jalanan yang dipanggil 'Black 14' secara besar-besaran di ibu negara pada hari Sabtu ini.

Bagaimanapun tegasnya bagi mengelirukan pihak keselamatan, perhimpunan tersebut dipanggil 'Perhimpunan Penyerahan Memorandum Rakyat Mengenai Hak Asasi Manusia' dengan rancangan mengumpulkan lebih kurang 50,000 yang akan berhimpun di sekitar ibu negara.

…

Ketua Polis Negara memberitahu kegiatan reformasi yang bermula pada bulan September 1998 adalah merancang untuk menggulingkan kerajaan melalui demonstrasi jalanan secara besar-besaran dan bersiap sedia untuk bertindak secara militant melalui beberapa pendekatan;

- Melaksanakan langkah-langkah tertentu untuk mendapatkan bahan letupan termasuk bom dan pelancar roket, menggunakan 'molotov cocktail', 'ball bearing' serta berbagai senjata berbahaya untuk menyerang pihak keselamatan bagi menimbulkan huru-hara semasa demonstrasi jalanan di ibu negara pada bulan Oktober 1998.

- Mendapatkan bantuan dan sokongan guru-guru silat serta

mempengaruhi sebilangan bekas pegawai dan anggota keselamatan supaya menyertai gerakan mereka.

…

Beliau menambah pada pertengahan tahun 1999, aktiviti gerakan reformasi muncul kembali dengan berselindung di sebalik platform sebuah parti politik.

Bagaimanapun, katanya, sebilangan daripada mereka telah menjalankan kegiatan-kegiatan yang boleh mewujudkan ketegangan kaum melalui isu-isu keagamaan dan perkauman.

Norian berkata, di antaranya ialah menyebarkan berita-berita palsu yang menggemparkan seperti dakwaan bahawa ramai orang Melayu telah dikristiankan semasa pilihan raya kecil Lunas yang lalu.

'Ciri-ciri militant semasa pilihan raya kecil itu juga dilakukan oleh aktivis reformasi melalui perbuatan ganas dengan mengancam, mengugut dan menakut-nakutkan para pengundi serta orang ramai,' ujarnya.

Menyentuh mengenai penahanan ketujuh-tujuh aktivis reformasi itu Norian memberitahu ia dilakukan kerana terdapat maklumat-maklumat mengenai penglibatan mereka dalam kegiatan yang boleh memudaratkan keselamatan negara.'

…

'Adalah jelas aktivis reformasi sanggup melaksanakan kegiatan-kegiatan di luar perlembagaan dan undang-undang demi mencapai matlamat mereka.

'Oleh itu tindakan di bawah Seksyen 73(1) ISA diambil kerana pihak polis percaya ada alasan-alasan untuk menahan mereka di bawah Seksyen 8 ISA kerana telah bertindak dengan cara yang memudaratkan keselamatan negara,' tegas beliau lagi.'

(pp 1 dan 4 *Utusan Malaysia* dated 12 April 2001);

(v) 'KUALA LUMPUR: Polis menahan tujuh orang mengikut Akta Keselamatan Dalam Negeri (ISA) sejak semalam kerana merancang menganjurkan demonstrasi jalanan yang dipanggil 'Black 14' secara besar-besaran di sini, pada 14 April ini.

Ketua Polis Negara, Tan Sri Norian Mai, berkata, mereka berhasrat mengumpulkan kira-kira 50,000 orang dalam demonstrasi itu di mana kegiatan itu boleh memudaratkan keselamatan negara.

Mereka yang ditahan ialah Mohamad Ezam Mohd Nor, 34, Tian Chua, 37, Hishamuddin Rais, 50, Saari Sungib, 43, N Gobalakrishnan, 41, Raja Petra Raja Kamaruddin, 49, dan Abdul Ghani Haroon, 36, semuanya dari Parti Keadilan Nasional.

Ezam ialah Ketua Pemuda, Tian Chua (Naib Presiden) dan Gobalakrishnan (Setiausaha Pemuda).

Menurutnya, mereka antara anggota kumpulan 20 yang ditubuhkan sudah mengadakan 12 perjumpaan sulit antara 6

Januari dan 4 April bertujuan merancang mempengaruhi rakyat mengadakan demonstrasi jalanan dan perhimpunan haram secara militant.
'Bagi mengelirukan pihak keselamatan, perhimpunan itu dipanggil Perhimpunan Penyerahan Memorandum Rakyat Mengenai Hak Asasi Manusia,' katanya di persidangan media di ibu pejabat polis Bukit Aman, di sini, semalam.
…
Sementara itu, ketika menyingkap kronologi gerakan reformasi, Norian berkata, kegiatan itu bermula pada September 1998 apabila mereka merancang untuk menggulingkan kerajaan melalui demonstrasi jalanan secara besar-besaran dan bersiap-sedia bertindak secara militan.
Menurutnya, antara pendekatan yang diambil iaitu melaksanakan langkah-langkah tertentu untuk mendapatkan bahan letupan termasuk bom dan pelancar graned, menggunakan bom api, bebola besi, serta pelbagai senjata berbahaya untuk menyerang pihak keselamatan.
…
… mendapatkan bantuan dan sokongan guru-guru silat serta mempengaruhi sebilangan bekas pegawai dan anggota keselamatan supaya menyertai gerakan mereka,' katanya.
'Pada pertengahan 1999 pula, gerakan reformasi muncul kembali dengan berselindung di sebalik platform sebuah parti politik dan sebilangan daripada mereka menjalankan kegiatan-kegiatan yang boleh mewujudkan ketegangan kaum melalui isu-isu keagamaan dan perkauman,' katanya.
Ini termasuk penyebaran berita-berita palsu yang menggemparkan seperti dakwaan kononnya ramai orang Melayu dikristiankan semasa pilihan raya kecil Lunas, Kedah tahun lalu …'
(p 16A *Harian Metro* dated 12 April 2001);

(b) Badrulamin allege as defamatory are as follows:

(a) 'Another ISA arrest?
FORMER International Islamic University lecturer Dr Badrul Amin Baharom is believed to have been detained under the Internal Security Act (ISA) early this morning.
…
Inspector-General of Police Tan Sri Norian Mai had said that a 'secret cell' within the Opposition was planning to violently overthrow the Government and that its members were in the process of arming themselves with explosives, grenade launchers and petrol bombs.
He had said the 'secret cell' comprised 20 members who were 'very serious' in their objective.

(p 1 *The Malay Mail* dated 20 April 2001);

(b) 'Bekas Pensyarah UIAM ditahan mengikut ISA KUALA LUMPUR, Jumaat - Seorang lagi aktivis reformasi, Dr Badrul Amin Baharon ditahan mengikut Akta Keselamatan Dalam Negeri (ISA) 1960 di rumahnya di Taman Desa Jaya, Kepong dekat sini, awal pagi ini.

…

Ketua Polis Negara, Tan Sri Norian Mai, memberitahu sidang akhbar di Kangar, tangkapan itu adalah lanjutan daripada penahanan tujuh aktivis reformasi pada 10 April lalu.

'Alasan penahanan adalah sama dengan yang saya pernah nyatakan dalam sidang akhbar sebelum ini.

…

Ketujuh-tujuh aktivis reformasi itu yang ditahan mengikut Seksyen 73(1) ISA, menganggotai sebuah kumpulan sulit yang merancang mempengaruhi rakyat membudayakan demonstrasi jalanan dan bertindak secara militan.' (p 5 *Berita Harian* dated 21 April 2001);

(c) 'IGP: A few more linked to street demonstrations may be arrested

…

He was speaking to the Press after visiting the State police headquarters.

Dismissing claims that Badrul Amin was detained as he was a member of an Opposition party, Norain said the arrest was made due to the former law lecturer's links with the reformasi movement.

'It (the arrest) has got nothing to do with politics and was done because he was involved in activities linked to street demonstrations and other actions which threaten public security.'

…

He added that those detained had set in motion plans to organise public gatherings which would escalate into violent street demonstrations.' (p 3 *The NST* dated 21 April 2001).

IMPUGNED WORDS WERE DEFAMATORY IN NATURE OR CAPABLE OF BEARING A DEFAMATORY MEANING

[74] Firstly, in construing whether the words complained of are capable of bearing a defamatory meaning, it is in essence a question of law that turns upon the construction of the words published per Gopal Sri Ram JCA at p 466 in *Chok Foo Choo* quoting a passage from the Privy Council case of *Jones v Skelton* [1963] 3 All ER 952 at p 958:

> The ordinary and natural meaning of words may be either the literal meaning or it may be implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning capable of being detected in the language used can be part of the ordinary and natural meaning of words. See *Lewis v Daily Telegraph Ltd*. The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to the jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

[75] In this regard, the test is whether the words published in the natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or lack of integrity on his part and if the answer is in the affirmative, then the words are defamatory (per Gopal Sri Ram JCA at p 467 in *Chok Foo Choo* citing with approval the case of *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393).

[76] Similarly the learned authors in *Gatley on Libel and Slander* (11th Ed), p 41 para 2.2 and p 46 para 2.7 stated a statement is capable of being defamatory if it tend to 'cause a person to be hated or despised' and or it would tend 'to lower the claimant in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally'.

[77] Secondly, it is for the court to ascertain whether the words complained of are in fact defamatory and this is a question of fact dependent on the circumstances of the particular case (*Chok Foo Choo* at p 467).

[78] The nub of the defendants' argument in that the press statement is not defamatory of the plaintiffs as the first defendant testified the first paragraph of the press statement (para 43 above) relates to the plaintiffs' arrest which is distinct from the remaining content of the press statement which comprises a chronology or background to the 'Reformasi' movement. I find there is no merit in the defendants' contention.

[79] I accept the arrangement of the press statement (see para 43 above) as described by the plaintiffs as follows:

> The press statement begins by announcing the arrest of the plaintiffs. Paragraphs 2 and 3 lay down events in 1998 and the purported potential aggression and violence perpetrated by Reformasi activists. Paragraph 4 sets out the revival of the Reformasi movement in 1999. Paragraph 6 of the press statement then brings the entire 'chronology' or 'background' of the Reformasi movement back to the present (year

2001). Within the present context (year 2001), the word 'militant' is repeated and it is used at this juncture in reference to impending present day events (year 2001). The final paragraph of the press statement (paragraph 7) then underscores the entire sting of the statement by categorically connecting the activities of Reformasi activists to their resulting arrests pursuant to s.73(1) ISA by the police.

[80] The press statement when read in its entirety and the context it was used, in my view, does not portray a clear distinction between the plaintiffs' arrests and 'chronology' or 'background' as the defendants claim but rather it is 'a seamless whole', 'cleverly infused together' (*Lim Guan Eng* at p 627 paras G–H adopting *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub*).

[81] Next, from the evidence of PW6, PW 7, PW8, Encik Hazlan Hassan, the reporter with *Harian Metro* and the writer of exh P7 and PW9, Encik Johari Mohd bin Ibrahim, reporter with the *NST* and writer in part of exh P12 (as the bylines depicted Rashidi Karim, a part time reporter who was present with him at the press conference in Kangar and Fazli Abdullah who was based in Kuala Lumpur) the following can been gleaned:

(i) … biasanya bila kita ada kenyataan akhbar, kita akan tukarjadi berita dan kita tak akan ikut kenyataan akhbar itu, sebab nama ini berita, jika kita ikut bulat-bulat itu namanya iklan … Berita yang tidak disensasikan tapi kita tulis berita ini isi kandungannya tidak lari daripada kenyataan akhbar itu (PW6 — NOP, Part III, p 621);

(ii) Isi kandungan nya [berita] tak lari daripada isi kandungan kenyataan akbar, maksudnya apa yang disampaikan dalam kenyataan tak lari dari apa yang berita saya yang tulis, dan maksudnya adalah menjurus kepada apa yang saya nak sampaikan. (PW6 — NOP, Part III, p 633);

(iii) Tidak [direka-rekakan]. Macam saya maksudkan tadi, kita tulis berita, kita tak boleh petik sebulat bulat daripada kenyataan akhbar, sebab kadang-kadang ayatnya tidak sesuai untuk dijadikan berita, kita akan olah ayat itu tapi dengan syarat isi kandungan dan maksudnya tidak lari … (PW6 — NOP, Part III, p 633);

(iv) Saya tidak mereka … Betul [keratan akhbar yang disediakan adalah berdasarkan kepada kenyataan yang dibuatoleh Tan Sri] (PW7 — NOP, Part III, p 653);

(v) Isi kandungan, maksud dan intipati berita yang di tulis sama dengan kenyataan akhbar Tan Sri Norian Mai atau pun berdasarkan kenyataan lisan Tan Sri Norian Mai (PW8 — NOP, Part III, p 673);

(vi) [Intipati, isi kandungan dan maksud sebagaimana yang di tulis … kekal. Tak berubah] (PW9 — NOP, Part III, p 685).

[82] Thus what can be concluded from the aforesaid evidence is the 'berita' as contained in the respective newspaper reports (para 73 above) all carried a

consistent narrative publishing thereafter a similar sting and substance as per the content of the press statement with slight variations as it is in the form of 'berita' depicting the plaintiffs as pleaded as:

(i) Traitors to the country;

(ii) Terrorists;

(iii) Seeking or planning to overthrow the government by violent and/or unlawful and/or unconstitutional means;

(iv) Violent persons;

(v) Persons capable of deception;

(vi) Persons who incite racial tension;

(vii) Persons who create and spread false allegation; and

(viii) Persons who have incited disloyalty amongst the armed forces of the country.

[83] Thus firstly, I find the impugned words in their natural and ordinary meaning alluded to above are defamatory of the plaintiffs.

[84] Secondly, in my judgment, I find the press statement and the 'berita' as contained in the respective newspaper reports are defamatory of the second plaintiff (Chua), third plaintiff (Hishamudin), fourth plaintiff (Saari) and sixth plaintiff (Badrulamin) but not of the fifth plaintiff (Badaruddin) (which I shall explain later). The reason being even the reporters as right-thinking members of society had a similar comprehension of the content of the press statement as alluded to above.

IMPUGNED WORDS REFER TO THE PLAINTIFFS

[85] I adopt what I stated earlier that there is no clear distinction between the plaintiffs' arrest and the so called 'chronology' or 'background' in the press statement and how the 'berita' in the various newspaper reports bore a similar sting and substance of that appearing in the press statement (paras 79–82 above). It can be clearly seen that they refer to the second plaintiff (Chua), third plaintiff (Hishamudin), fourth plaintiff (Saari) and sixth plaintiff (Badrulamin) even if one is to ignore the pictures appearing in the respective newspaper reports as in the words of the first defendant, these are well known personalities.

[86] As for the fifth plaintiff, there is no reference to him in the press statement. In the case of *Morgan v Odhams Press Ltd and another* [1971] 2 All ER 1156 (HL) (cited by the defendants), the name 'Johnny Morgan' (the plaintiff) did not appear in the article of *The Sun* and the plaintiff relied on

certain extrinsic evidence which he said would entitle an ordinary reader to understand the article referred to him. On the question of identity, the test is an objective one where the ordinary reader must have rational grounds for his belief that the words refer to the plaintiff and giving no room for undue suspicion or pure speculation (per Lord Guest in *Morgan*'s case at pp 1176j–1177a–b). Therefore I cannot accept the contention of the plaintiffs that the impugned words refer to the fifth plaintiff and were defamatory of him on account of the matter referred to in para 67(c) above.

WHETHER THE DEFENCE OF JUSTIFICATION IS AVAILABLE

[87] To establish the defence of justification, the first defendant has to prove:

(i) that the defamatory imputation is true;

(ii) justify the precise imputation complained of; and

(iii) the truth of all the material statements in the libel. There must be a substantial justification of the whole libel. However, it is not necessary to prove the truth of every word of the libel.

(per Chua J in Workers' Party v Tay Boon Too; *Workers' Party v Attorney-General* [1975] 1 MLJ 47 at p 51 F–H left column)

[88] A similar proposition of law is echoed in s 8 of the Defamation Act 1957 which reads:

> 8. In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[89] The defendants contend part of the press statement is true on these grounds:

(a) Eksibit D2 menyatakan nama-nama yang ditahan di bawah seksyen 73 AKDN 1960 kerana terdapat maklumat yang menyatakan mereka terlibat dengan aktiviti yang mengugat keselamatan Negara [NOP, Part V, m/s 1495];

(b) Maklumat-maklumat tersebut diperolehi daripada pihak SB dan juga sumber luar pihak polis [NOP, Part V, m/s 1507];

(c) Kenyataan akhbar Eksibit D2 tersebut adalah berdasarkan maklumat-maklumat yang belum lagi disahkan … tangkapan dibuat terhadap Plaintif-Plaintif untuk tujuan pengesahan sama ada maklumat-maklumat yang diterima oleh Defendan-Defendan mengenai setiap Plaintif adalah benar atau tidak [NOP, Part V, m/s 1507];

(d) DW20 juga menyatakan asas tangkapan setiap Plaintif tidak semestinya militant [NOP, Part V, m/s 1499) ada sebahagiannya yang DVV20 kategorikan sebagai tidak militant sebagai contoh adakan demonstrasi jalanan [NOP, PartV, m/s 1507];

(e) Sepanjang tempoh tahanan di bawah seksyen 73 Akta ISA tersebut, setiap Plaintif telah disiasat oleh pegawai-pegawai penyiasat [DW18, DW15, DW17, DW16 dan DW19] yang ditugaskan. Berdasarkan siasatan tersebut, secara keseluruhan nya terdapat keterangan yang menunjukkan Plaintif-Plaintif terlibat dengan mesyuarat-mesyuarat untuk merancang reformasi, perhimpunan haram dan demonstrasi jalanan serta ada diantara Plaintif iaitu Plaintif Keenam yang memberikan ceramah-ceramah berunsur hasutan.

[90] I find the first defendant's reliance on the aforesaid grounds is misconceived. I agree with the plaintiffs the defence of justification does not lie with the first defendant for these reasons:

(a) there is no evidence or material particulars produced to substantiate the contention of the police that the plaintiffs were involved in any violent or aggressive militant activities capable of overthrowing the government prior to their arrests;

(b) on the contrary, there is evidence where the searches conducted on the plaintiffs' respective premises showed no items capable of suggesting that the plaintiffs were involved in such militant activities;

(c) there is evidence that no questions on the plaintiffs' purported militant activities were advanced by the police to any of the plaintiffs during interrogations;

(d) the first defendant could only say that the information as contained in the press statement was derived from continuous police investigation (NOP, Part V, p 1483); and

(e) the court cannot rely on ground (e) in para 89 above because the source of the information is the redacted documents particularly, bundles M, N, O, P and Q which I have ruled to be inadmissible.

[91] I find the first defendant has failed to produce any material evidence to support his contention that the contents of the press statement are true. The defence of justification therefore falls.

A WHETHER THE DEFENCE OF QUALIFIED PRIVILEGE IS AVAILABLE

[92] Having ruled the first defendant cannot rely on the defence of justification, I now turn to the issue of whether the alternative defence of qualified privilege is available to the first defendant. In this regard the burden is on the first defendant to demonstrate:

(a) the existence of facts to show that he was under a moral, social or legal duty to communicate the defamatory matter to the recipient or recipients, the general public in Malaysia or the wider circle being the world at large; and

(b) the recipient or recipients must be under a duty or have an interest in receiving such publication (*S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173) at p 178C–E left column).

[93] The first defendant as the IGP, the highest ranking officer in the police force is endowed with the powers under the Police Act 1967, amongst others, to enforce the laws, crime prevention and be responsible for the security of the country. Seen in this context, in my view, it is not only the first defendant's privilege but also he has a legal duty to make the press statement to members of the press at the press conference to inform the general public/community at large in Malaysia on matters afffecting public interest and concern in the country.

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[94] The defence of qualified privilege unlike the defence of justification is not an absolute defence. So to defeat the defence of qualified privilege, the plaintiffs have to prove the existence of malice Such malice may occasion if the publication was made recklessly in that no effort was made to verify the truth of the content or was done with some dominant improper motive (*Gatley on Libel and Slander*, (11th Ed), pp 598–604; *S Pakianathan*'s at p 179D–G left column).

[95] Tranposed to the factual matrix of this case, the only source of information contained in the press statement according to the first defendant's evidence was it was derived from continuous police intelligence (NOP, Part V, p 1483).

[96] To reiterate when searches were made at the homes of the second, third, fourth and sixth plaintiffs who were arrested under s 73(1) of the ISA, the police admitted there were nothing found in their premises in the likes of what was mentioned in the press statement as 'bahan letupan termasuk bom dan 'grenade launcher', 'molotov cocktail', 'ball bearing' or correspondences indicative of the plaintiffs seeking support from 'silat' experts (DW1 — NOP, Part III, p 729, DW2 — NOP, Part III, pp 745–746, DW3 — NOP, Part III, pp 764–766, DW4 — NOP, Part III, pp 776–777).

[97] Neither were the plaintiffs interrogated on the purported militant activities but rather the interrogations had a political emphasis and orientation as eg in the case of Saari:

> Pada asasnya saya telah ditanya oleh pegawai penyiasat mengapa saya tidak menggunakan UMNO sebagai platform bagi saya untuk menyuarakan rasa tidak puas hati saya. Malah, saya sebenarnya telah diarahkan oleh pegawai itu untuk menulis mengenai topic 'Kenapa tidak bergerak dalam UMNO' (S&J 81).
>
> Saya telah memberikan dua sebab kenapa saya tidak memilih UMNO -politik wang dalam UMNO dan budaya dalam UMNO untuk menjatuhkan orang-orang tertentu. Saya juga memberitahu mereka bahawa saya suka visi Keadilan yang mana merupakan sebuah parti yang memupuk semangat berbilang kaum (S&J 83).
>
> Mereka memberitahu saya bahawa UMNO adalah satu model yang baik yang boleh mempertahankan keturunan Melayu dengan kerjasama kaum-kaum lain. Bahawa orang Melayu yang mengikuti jejak Anwar Ibrahim dan memasuki parti Keadilan adalah pengkhianat kepada bangsa Melayu (S&J 84).

In fact the interrogation officers referred to earlier admitted that the questioning had nothing to do with national security. In this regard I adopt what I have alluded to at para 44–47 above.

[98] The timing of the plaintiffs' arrests was less than a week from 'Black 14', the anniversary of Dato' Anwar Ibrahim's conviction and the reference to 'gerakan reformasi dalam masa yang terdekat ini … untuk menganjurkan demonstrasi jalanan yang di panggil 'Black 14' … secara besar-besaran di KUALA LUMPUR …' is telling. The plaintiffs at the material time were supportive of the *reformasi* movement which was associated with Dato' Anwar Ibrahim with a growing number of supporters and posed a potential threat to UMNO (see Saari's evidence in para 97 above and Chua's answer to Q89 WSPW5).

[99] The first defendant conceded the content of the press statement was merely intelligence obtained at the material time and which at the time it was issued, was inconclusive and unconfirmed, (see para 89 (b)–(c) above). Being fully aware it was a highly publicised press statement made in the presence of local and foreign media, yet the first defendant being the highest ranking officer in the police force and the head at that did not make effort to correct any perceived inconsistency despite taking the position that the 'berita' in the respective newspapers are not reflective of the true purport of the press statement.

[100] Bearing in mind the matters stated, it has been shown none of the allegations hurled at the plaintiffs by the first defendant as contained in the press statement and which the first defendant caused to be published as per the 'berita' in the respective newspaper were true; this implies malice on the part of the first defendant. In the circumstances I find there is proof of malice which vitiates the defence of qualified privilege.

DAMAGES FOR DEFAMATION

[101] In determining the award of damages in an action for defamation, I am mindful of the following principles. The claimant need not allege that actual damage has resulted from the words complained of as 'The law presumes some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation' and he is entitled to general damages as the court may properly award (*Gatley on Libel And Slander*, para 28.27 pp 983–984.

[102] In the assessment of damages, the following factors may be considered:

(i) the position and standing of the plaintiff;

(ii) the gravity and seriousness of the libel;

(iii) the mode and extent of the publication;

(iv) the mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel;

(v) the uncertainty undergone in litigation;

(vi) the conduct of the defendants from the time of the libel down to the very moment of the verdict; and

(vii) the absence or refusal of any correction, retraction or apology.

(*MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & Other Appeals* [1995] 2 MLJ 493; [1995] 2 CLJ 912 at p 225(MLJ); p 933(CLJ)).

[103] 'An action for defamation is not used as an engine of oppression. Otherwise, the constitutional guarantee of freedom of expresssion will be

rendered illusory' (per Gopal Sri Ram JCA (as he then was) in *Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385 at p 395 c–d) in the context of making an observation on the need to check the trend in quantifying damages set by *MGG Pillai*.

[104] The amount of damages to be awarded in each libel case depends on the facts and circumstances of the case; it is subjective and no scale can be fixed (per Abdul Hamid Mohamad JCA (as he then was) in *Karpal Singh a/l Ram Singh v DP Vijandran* [2001] 4 MLJ 161 at pp 185–186; [2001] 3 CLJ 871 at pp 902–903).

[105] The plaintiffs contend a reasonable sum in damages for each of the defamed plaintiffs ought to be RM100,000 after drawing to the court's attention to *Institute of Commercial Management United Kingdom v The New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408; [1993] 2 CLJ 365, *Le Mercier's Fine Furnishings Pte Ltd & Anor v Italcomm (Malaysia) Sdn Bhd* [1996] MLJU 365; [1996] 3 CLJ 590, *Raveychandran s/o Goonydo v Datuk Abdul Kadir Jasin & Anor and Another Action* [1997] MLJU 344; [1997] 3 CLJ Supp 68 as examples of cases where the court awarded damages of RM100,000.

[106] On the other hand the defendants submit a reasonable sum of damages to be awarded is RM10,000 for second and fourth plaintiffs, RM7,000 for the sixth plaintiff and RM5,000 for the fifth plaintiff on basically on the following grounds:

(a) the extent of publication whereby the publication of the press statement stemmed from a press conference over whom the first defendant has no control over the reporters citing *Tun Datuk Patinggi Hj Abdul Rahman Ya'kub* at p 419 where the court awarded RM100,000 after considering amongst others, the defamatory publication was confined to Sarawak and that he was no longer the Chief Minister at the time he was defamed but which the court found worked in the plaintiff's favour due to him being well known and his wider circle of friends; and

(b) no evidence of the plaintiffs being shunned (*Ummi Hafilda bte Ali v Ketua Setiausaha Parti Islam Se Malaysia (PAS) & Ors* [2006] 4 MLJ 761; [2006] 3 CLJ 252.

[107] In adhering to the relevant principles applicable in assessing the damages in the circumstances of this case I considered the following factors. At the material time the second plaintiff was the Vice President Parti KEADILAN and currently a Member of Parliament, third plaintiff was a film director and is now an activist for justice and a non-governmental individual, fourth plaintiff was an 'Ahli Majlis Pimpinan Tertinggi Undangan Parti Keadilan Nasional and

is currently ADUN for Hulu Langat whilst the sixth plaintiff is a preacher and political/social activist and is presently the 'Pengarah Penerangan Pejabat Dato' Menteri Besar Selangor'.

[108] The publication of the defamatory words appeared in the press statement which was caused by the first defendant to be published once on 12 April 2001 in the *NST*, *Utusan Malaysia*, *Berita Harian* and the *Harian Metro* in respect of the second, third and fourth plaintiffs and twice in respect of the sixth plaintiff in the *Malay Mail* (20 April 2001) and the *Berita Harian* and the *NST* (21 April 2001).

[109] There was malice as the first defendant made no effort to correct the statements appearing as 'berita' in the newspaper reports after having taken a stand that the negative slant portrayed of the plaintiffs in the respective newspapers is misconceived and not reflective of the press statement.

[110] As a consequence of the publication of the defamatory words:

(a) the third plaintiff stated 'Nama saya rosak kerana dikaitkan dengan keganasan. Tuduhan ini memeranjatkan kawan-kawan saya bukan sahaja di Malaysia malah di Australia, Belguim dan London' (S&J 86 WSPW2);

(b) the fourth plaintiff stated — 'Kesan fitnah tersebut saya telah ditahan tanpa bicara selama kira-kira 2 tahun 2 bulan. Hak asasi saya dicabul. Kebebasan saya dirampas. Hak saya membela diri dinafikan. Saya dipisahkan secara paksa daripada isteri, anak-anak, bapa saya yang sudah tua dan ahli-ahli keluarga saya yang lain secara zalim'. (Q&A 85 WSPW1);and

(c) the sixth plaintiff stated 'Tuduhan … telah merosakkan imej saya sebagi bekas pensyarah dan seorang pendakwah ugama. Pelajar-pelajar saya tidak yakin kepada saya. Kawan-kawan saya memandang rendah dan menjauhi diri darpada saya …' (S&J 97 WSPW3).

[111] As a result of the libel, there was injury to the reputation of the second, third, fourth and sixth plaintiffs. They also suffered loss of reputation as a result of the unlawful detention (para 61–63 above). In both instances, they suffered injury to feelings ie indignity, mental distress, disgrace or humiliation as a consequence. In this regard I am of the humble opinion there is some kind of overlap in terms of the damages to be awarded.

[112] Having regard to all the aforesaid matters the court awards to the second, third, fourth and sixth plaintiffs general damages of RM60,000 and aggravated and exemplary damages of RM40,000 as there was absence of material evidence which showed the plaintiffs were a threat to national security

and there has been oppressive and unconstitutional action by the police personnel involved (*Rookes v Barnard* [1964] AC 1129 adopted by the Court of Appeal in *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675; [2005] 4 CLJ 871 at pp 881–882).

OTHER MATTERS

[113] The defendants contend the failure on the part of the plaintiffs to name the individual police officers as defendants in the proceedings is fatal.

[114] The plaintiffs concede in this proceedings:

(a) there were various police officers involved in the arrest and detention of the plaintiffs; and

(b) it is trite law that in a claim in tort against the government, the government officer who was responsible for the alleged tortuous act must be made a party and his liability be established before the government could be made vicariously liable as principal (ss 5–6 of the Government Proceedings Act 1956; *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 CLJ 663.

[115] However in the circumstances of this case, the plaintiffs have pleaded the following:

> 9. The first defendant (Tan Sri Norian Mai) was at all material times the Inspector-General of the Royal Malaysian Police *is and was at all material times responsible for the acts of the various police officers alluded to in this pleading*. (Emphasis added.)
>
> 10. The second defendant (Menteri Hal Ehwal Dalam Negeri), being the Home Minister of Malaysia, is and was at all material times the Minister responsible in respect of orders made under Section 8 of the Internal Security Act, 1960 (ISA).
>
> 11. The third defendant (Kerajaan Malaysia), being the Government of Malaysia, is vicariously liable for the acts of its servants and/or its agents including inter alia, the first defendant, the second defendant and the various police officers alluded to in this pleading.

[116] I agree with the plaintiffs' submission since it is pleaded that (a) the IGP is named as a defendant, (b) he is vicariously liable for the acts of the officers of the Royal Malaysian Police and (c) he owes a duty of care to the plaintiffs, it is not necessary to name the various individual police officers as defendants in this proceedings.

[117] Furthermore, the defendants have at para 2 of their statement of defence agreed with this position without any reservation:

> 2. Perenggan-perenggan 9, 10 dan 11 Pernyataan Tuntutan plaintiff-plaintiff adalah diakui.

[118] The same position was maintained by the parties in para 3 of the statement of agreed facts as:

> 3. The third defendant, being the Government of Malaysia, is vicariously liable for the acts of the first and second defendants and the various police officers alluded to in the Statement of Claim.

[119] In terms of costs, the plaintiffs seek costs of RM500,000 whilst the defendants submit the costs awarded should be about RM30,000.

[120] The court fixed costs at RM200,000 after considering the factors in O 59 r 16 of the Rules of Court 2012:

(a) although on the face of it the case pertains to unlawful detention, submissions on the finer and minute distinctions on several Federal Court and Court of Appeal authorities had to be drawn;

(b) the trial went on for 17 days with 20 witnesses. There were voluminious documents and authorities involved in this case including copious NOP which require time and labour to be expended by the counsel;

(c) the case is of great importance to the plaintiffs as they were unlawfully detained and defamed by the highest ranking police officer in the country; all the more when it impinges on the liberty of the plaintiffs which to a great measure is a matter difficult to be compensated in monetary terms; and

(d) discount made in respect of the issues not found in favour of the plaintiffs.

[121] Interest on the judgment sum at the rate of 8% from the date of filing of the writ of summons to date of judgment and at the rate of 5% from the date of judgment to the date of realisation.

CONCLUSION

[122] On a balance of probabilities I find the defendants are liable for the unlawful detention of the plaintiffs under s 73 of the ISA and for defamation and thereby made the order referred to in paras 65–66, 112 and 120–121 above.

Claim allowed.

Reported by Afiq Mohamad Noor